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EDITOR'S NOTE

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ocketed:
ugust 8, 1985

Title: International Longshoremen's Asscciation, AFL-CIO, Appellant
v.
Larry Davis

Court: Supreme Court of Alabama

Counsel for appellant: Gleason,Thomas W., Goldburg,Charles R.

Counsel for appellee: Biles,Bayless E.

ntry	Date	Note	Proceedings and Orders
1	Aug 8 1985	G	Statement as to jurisdiction filed.
2	Sep 6 1985		Motion of appellee Larry Davis to dismiss filed.
3	Sep 11 1985		DISTRIBUTED. September 30, 1985
5	Oct 7 1985		REDISTRIBUTED. October 11, 1985
6	Oct 15 1985		PROBABLE JURISDICTION NOTED.
7	Nov 12 1985		Record filed.
8	Nov 27 1985		Joint appendix filed.
9	Nov 27 1985		Brief of appellant ILA filed.
11	Dec 11 1985		Order extending time to file brief of appellee on the merits until January 9, 1986.
13	Dec 16 1985		Order extending time to file brief of appellee on the merits until January 9, 1986.
14	Jan 7 1986		SET FOR ARGUMENT, Tuesday, February 25, 1986. (2nd case)
15	Jan 9 1986		Brief of appellee Larry Davis filed.
16	Jan 8 1986	G	Motion of National Right to Work Legal Defense Foundation, Inc. for leave to file a brief as amicus curiae filed.
17	Jan 9 1986		Brief amicus curiae of Council of State Governments filed.
18	Jan 13 1986		CIRCULATED.
20	Jan 27 1986		Motion of National Right to Work Legal Defense Foundation, Inc. for leave to file a brief as amicus curiae GRANTED.
21	Feb 7 1986		Reply brief of appellant ILA filed.
22	Feb 25 1986		ARGUED.

JURISDICTIONAL

STATEMENT

85-217

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Appellant,

v.

LARRY DAVIS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

JURISDICTIONAL STATEMENT

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Questions Presented

1. Does the doctrine of federal preemption, as applied to national labor law in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959), deprive a state court of subject matter jurisdiction, so that the defense of federal preemption cannot be waived?

2. Is a state preempted by §§ 7 and 8 of the Labor Management Relations Act, 29 U.S.C. §§ 157, 158, from applying its law of misrepresentation to a union's organizational activity directed towards individuals who are arguably employees, rather than supervisors?

3. Where there has been no determination by the National Labor Relations Board but only a refusal by a Regional Director to issue a complaint, based upon his finding that the charging party is a supervisor rather than an employee, has there been a clear determination as to the supervisory status of individuals other than the charging party, so that actions in state court by these individuals are not preempted?

4. Does federal labor law preempt the states from imposing no-fault liability upon unions for innocent misrepresentations in the course of organizational activity?

5. Is a jury award of excessive damages under state tort law which goes beyond mere compensation to an injured party and penalizes a union for its organizational activities preempted by national labor law which guarantees to the union its right to engage in those activities?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. .....

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ON APPEAL FROM THE SUPREME COURT OF ALABAMA

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the Supreme Court of Alabama is not yet reported. It is reproduced in the appendix. The judgment of the Circuit Court for the County of Mobile was entered upon a jury verdict. No opinion was issued by the circuit court.

Jurisdiction

This is an action for alleged fraud and misrepresentation commenced in the Circuit Court for the County of Mobile, Alabama. A judgment in favor of plaintiff was affirmed by the Supreme Court of Alabama on May 10, 1985. A notice of appeal was filed in the Supreme Court of Alabama on May 23, 1985. The Alabama law of misrepresentation is statutory, *see* Alabama Code § 6-5-101, *et seq.* (1975), and

the statute, as applied in this case, has been upheld as against a claim of preemption. Accordingly, jurisdiction of the appeal is conferred on this Court by 28 U.S.C. § 1257(2).

Relevant Constitutional and Statutory Provisions

(1) U.S. Const. art. VI, § 10, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

(2) Labor-Management Relations Act, § 7, 29 U.S.C. § 157.

Rights of employees:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 U.S.C. § 158(a)(3)].

(3) Labor-Management Relations Act, § 8(b)(1), 29 U.S.C. § 158.

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

(4) Alabama Code § 6-5-101 (1975).

> Misrepresentation of material facts.
>
> Misrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal fraud.

Statement of the Case

Facts

Plaintiff-Appellee Larry Davis was formerly employed as a ship superintendent by the Ryan-Walsh Stevedoring Company, which is in the business of loading and unloading ocean vessels in the port of Mobile, Alabama. Defendant-Appellant International Longshoremen's Association, AFL-CIO ("ILA") is a labor organization which represents longshoremen and employees in related waterfront crafts in ports from Maine to Texas and on the Great Lakes. ILA and Ryan-Walsh engage in collective bargaining concerning the terms and conditions of employment of longshoremen and certain other employees employed by the company.

As a regular part of its stevedoring operations, Ryan-Walsh employs a number of ship superintendents who hire the longshoremen and also direct their work on the pier.[1]

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[1] Because it cannot be predicted how many, if indeed any, ships will be in port on a particular day, the labor requirements of a stevedore vary from day to day. Thus, the historical practice has been for stevedores, including Ryan-Walsh, to hire their longshoremen on a daily basis.

While the ship superintendents function as the immediate superiors of the longshoremen, their compensation is often inferior. To obtain higher wages and better working conditions, the ship superintendents decided to form their own labor union and to seek affiliation with the ILA.[2]

In March, 1981, one of the superintendents, Ben Trione contacted the ILA office in Houston, inquired as to the procedure for obtaining an ILA charter, and requested a copy of the ILA's walking foremen's agreement.[3] Benny Holland, an ILA official in Houston, discussed the possibility of organizing the superintendents with Trione, but advised him that there would be certain legal difficulties. Under § 14 of the Labor Management Relations Act, supervisors are not considered to be "employees" within the meaning of the LMRA. 29 U.S.C. § 164. Thus, although the superintendents were entitled to join the union, if they were eventually determined by the National Labor Relations Board (NLRB) to be "supervisors", Ryan-Walsh would be free to fire them for their union activity. Nevertheless, Trione and Appellee Davis arranged an organizational meeting of the superintendents and asked Holland to attend.

Approximately twenty superintendents attended the organizational meeting. Although they desired union representation, many of the men were reluctant to sign pledge cards for fear of reprisal by the employer. In an attempt to reassure the men, Trione asked Holland to explain what action the union could take if the men were discharged for union activities. Davis claims that Holland told the

[2] Under § 14 of the Labor-Management Relations Act, the ship superintendents are permitted to become and remain members of a labor organization, regardless of whether they are "supervisors" within the meaning of the Act. 29 U.S.C. § 164.

[3] In Houston, the longshoremen are directed by walking foremen, who perform a job function similar to that of the ship superintendents in Mobile. The walking foremen belong to an ILA local and are covered by a collective bargaining agreement.

men that the ILA could get them their jobs back with back pay, if they were fired for union activities. Holland, on the other hand, testified that he told the men that he did not know whether they were supervisors, but that, if they were supervisors, "they would not be covered under the Act." In any event, several of the superintendents, although less than a majority of those present, signed pledge cards after listening to Holland's statement. At the conclusion of the meeting, Davis and Trione collected the pledge cards and kept them so that they would be able to submit them to the NLRB when they had the required number of signatures.[4] However, a sufficient number of cards was never obtained, and no representation petition was ever filed.

The next day, Monday, April 13, Trione (but not Davis) was fired by Ryan-Walsh for his union activities. Trione immediately contacted the ILA which retained an attorney for him.[5] The attorney filed unfair labor practice charges against Ryan-Walsh with the NLRB. The charges alleged that, although Trione was a superintendent, he was nonetheless an employee under the Act, and that by firing him for union activities the employer had violated § 8(a)(3) of the LMRA. 29 U.S.C. § 158(a)(3). On May 15 the NLRB's Regional Director declined to issue a complaint, ruling that Trione was a "supervisor" and that as a result the employer had not violated the Act. No appeal was

[4] Under § 9 of the LMRA, the NLRB may not certify a union to act as collective bargaining representative unless it has the support of the majority of the employees in the unit. 29 U.S.C. § 159.

[5] Holland also suggested that Trione establish a picket line to protest his (presumably illegal) discharge. In response to Trione's picketing, Ryan-Walsh obtained a temporary restraining order in the Mobile County Circuit Court on April 21. The restraining order was followed by a preliminary injunction against Trione's picketing or other interference with Ryan-Walsh's operations on May 4.

ever taken by Trione from the dismissal of his charge by the Regional Director.[6]

On or about May 18, Ryan-Walsh learned that, despite the outstanding injunction against Trione and the unfavorable ruling from the NLRB, Davis was persisting in his efforts to organize the ship superintendents. As a result, Ryan-Walsh discharged Davis on May 18.[7] Although unemployed for three months, Davis eventually found work as a manager for an engineering supply company.[8]

Proceedings in the Alabama Courts

This action for alleged fraud and misrepresentation was filed on October 5, 1981. The trial court instructed the jury as to the elements of both intentional and reckless misrepresentation but then also charged the jury that they could find the ILA liable for even an "innocent misrepresentation," under Alabama Code § 6-5-101 (1975). The jury returned a general verdict in favor of plaintiff in the amount of $75,000.00.

In its motion to the trial court for a judgment *non obstante veredicto* (j.n.o.v.), the ILA raised its defense of federal preemption. The trial court denied the motion for a j.n.o.v., and judgment was entered on the verdict.

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[6] The Rules and Regulations of the NLRB provide for an appeal to the NLRB's general counsel from the Regional Director's refusal to issue a complaint. *See* 102.19 NLRB Rules and Regulations and Statements of Procedure, Series 8 as amended. *See also* 29 U.S.C. § 153(d).

[7] Davis never contacted the ILA to request that they take any action on his behalf relative to the discharge. Except for Davis and Trione, none of the other superintendents who signed ILA pledge cards or attended the meeting of April 12 were fired by their employer.

[8] Davis' 1980 income at Ryan-Walsh was $20,435.00. At the time of trial his "estimated" annual earnings with the engineering company were $19,500.00.

On appeal to the Alabama Supreme Court, the ILA raised a three-fold challenge to the judgment of the trial court based on federal preemption. First, the union argued that Alabama was totally preempted from applying its law of misrepresentation to the ILA's organizational activities because this conduct is protected under LMRA § 7 and because, if the union were guilty of any materially misleading statements, this would be an unfair labor practice under LMRA § 8(b)(1). Second, the union urged that, even if not totally preempted, Alabama could not apply its law of innocent misrepresentation, Alabama Code § 6-5-101 (1975), without encroaching upon federally protected rights. Third, it was argued that even if the case might properly be heard by the Alabama courts, the verdict actually rendered was so excessive as to be inconsistent with national labor law and preempted.

In affirming the judgment in all respects, the Alabama Supreme Court took the view that the threshold issue was whether federal preemption is a waivable defense.[9] The court held that federal preemption, as an "affirmative defense", is waivable and must be affirmatively pleaded in order to avoid waiver. Appendix at 1a-2a.[10]

In a footnote to its opinion, the court indicated that were it to rule on the merits, it would not find that the state court's jurisdiction was federally preempted. Appendix at

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[9] Prior to this case, the Alabama courts had held that federal preemption need only be raised at the trial level to be adequately preserved for appellate review. *Powell* v. *Phenix Federal Savings & Loan*, 434 So.2d 247 (Ala. 1983).

[10] Appellant agrees that federal preemption is an "affirmative defense", in the sense that the burden of proving that a state cause of action is preempted rests upon the defendant. Nevertheless, since federal preemption goes to the subject matter jurisdiction of the state court, the defense is non-waivable, and a defendant should have the opportunity of convincing the court that a claim is preempted at any stage of the proceeding, even upon appeal. Fed. R. Civ. P. 12(h)(3). *Sea-Land Service, Inc.* v. *ILA*, 625 F.2d 38 (5th Cir. 1980).

3a, n.2. Citing this Court's decision in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959), the Alabama court expressed its view that a dispute between a union and an employee concerning the truthfulness or misleading nature of the union's appeal for membership was of only "peripheral concern to the NLRB." *Id.* [11] The court did not expressly address ILA's alternative arguments that the submission of the federally-preempted innocent misrepresentation theory required a new trial or that the excessive award of damages itself transgressed the Supremacy Clause.

The Questions Are Substantial

Questions of federal preemption require a delicate balancing of the interests of our state and federal governments in the light of Congress' sometimes obscure intent. Thus, cases involving federal preemption are particularly appropriate for plenary consideration by this Court. In the labor law field in particular this Court has frequently been called upon to determine whether state court jurisdiction has been displaced. *See e.g. Belknap, Inc.* v. *Hale,* —— U.S. ——, 77 L.Ed.2d 798 (1983); *Sears, Roebuck & Co.* v. *Carpenters,* 436 U.S. 180 (1978); *Farmer* v. *United Brotherhood of Carpenters and Joiners, Local 25,* 430 U.S. 290 (1977).

This case presents several variants on the issue of federal preemption that require definitive resolution by this Court. There is the general constitutional question, which is not confined to the area of labor law, of whether the defense of federal preemption goes to subject matter jurisdiction and so can not be waived. There is the question of whether state law may be applied at all to regulate union activity designed to organize individuals who, although they exercise some degree of supervisory authority, are nonetheless arguably employees,—an issue of major importance to unions representing employees in national industries because such unions must of necessity undertake organizational activity in a variety of different states. If state law is not completely preempted, there is the question of how far the states may go in applying their own law before they cross the line and infringe upon federal jurisdiction so as to call into play the constitutional bar.

[11] The court disregarded the fact that had a representation petition been filed, the NLRB might have decided the precise issue decided by the jury, i.e., whether a misrepresentation has been made by the ILA. As noted, if an appeal for union membership is materially misleading, it constitutes an unfair labor practice. *NLRB* v. *Gorbea, Perez & Morell,* 300 F.2d 886 (1st Cir. 1962).

Subject Matter Jurisdiction

The Alabama Supreme Court held that federal preemption was an affirmative defense which could be, and was, waived. Citing no authority for its conclusion, the court appeared to recognize that other states are unanimous in holding that federal preemption deprives a state court of subject matter jurisdiction. *See e.g., Consolidated Theatres* v. *Theatrical Stage Employees, Local 16,* 69 Cal. 2d 713, 73 Cal. Rptr. 213, 447 P.2d 325 (1968); *Chicago & North Western Railway Co.* v. *La Follette,* 27 Wis. 2d 505, 135 N.W. 2d 269 (1965); *General Building Contractors' Association* v. *Local 542,* 370 Pa. 73, 87 A.2d 250 (1952). Appendix at 2a. The decision below also conflicts with federal authority on this question. *See Carpenters Health and Welfare Fund* v. *Kenneth R. Ambrose, Inc.,* 665 F.2d 466, 470 (3d Cir. 1981) (federal preemption is jurisdictional).

A conflict between decisions of the highest courts of two or more states on a federal question is a ground on which this Court will grant certiorari. *Citizens and Southern National Bank* v. *Bougas,* 434 U.S. 35 (1977). By the same token, the conflict created by the decision under appeal among the highest courts of several states on the question

of whether the defense of federal preemption is waivable calls for plenary review on appeal. *See* Stern and Gressman, *Supreme Court Practice,* at 326-327 (5th Ed. 1978).

The question of whether federal preemption deprives the states of subject matter jurisdiction is fundamental to our constitutional system. Where state law is in conflict with an act of Congress, it is unconstitutional under the Supremacy Clause. *Perez* v. *Campbell,* 402 U.S. 637 (1971). The effect of this repugnance is to render the offending law null and void. *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 177 (1803); *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151 (1978). Since the state law pursuant to which the action is brought is void, there is no subject matter to which a court's jurisdiction can attach, and this lack of subject matter jurisdiction may be raised at any time, *Sea-Land Service, Inc.* v. *International Longshoremen's Association, AFL-CIO,* 625 F.2d 38 (5th Cir. 1980). The Alabama Court's waiver theory runs counter to basic constitutional principles.

General Preemption

Holding that the preemption defense had been waived, the Alabama court did not reach the merits of the ILA's appeal. However, the court indicated that, if it had reached the merits, it would have found no preemption. Appendix at 3a, n.2. This view, though espoused in dictum, calls for plenary consideration, since it goes to important questions of national labor law and subsumes the application of prior decisions of this Court.

Appellant argued that Alabama was totally preempted from applying its law of misrepresentation to the ILA's efforts to organize the ship superintendents. Appeals to employees to join a union are protected by LMRA § 7, 29 U.S.C. § 157. The states may not, under the Supremacy Clause, assert their laws to undermine or abrogate rights conferred by Congress. *Chicago and North Western Transportation Company* v. *Kalo Brick & Tile Company,* 450 U.S. 311, 317 (1981). Moreover, even if the union had in the course of its organizational activities engaged in material misrepresentations, still state action would be preempted. Material misrepresentation is an unfair labor practice. 29 U.S.C. § 158(b)(1). *Compare NLRB* v. *Standard Container Company,* 428 F.2d 793 (5th Cir. 1970) (appeals for membership protected) *with NLRB* v. *Gorbea, Perez & Morell,* 300 F.2d 886 (1st Cir. 1962) (fraudulent representation to induce membership is an unfair labor practice).[12] Where union activity is arguably in contravention of national labor law, there is no state jurisdiction. *Local 1926, International Union of Operating Engineers, AFL-CIO* v. *Jones,* 460 U.S. 669, 676-78 (1983); *Iron Workers Union* v. *Perko,* 373 U.S. 701 (1963).

The ship superintendents may in fact be supervisors rather than employees, and activity designed to organize supervisors is not protected. However, until the status of the ship superintendents has been clearly determined, they are arguably employees. Thus, appeals to the superintendents to join the ILA are arguably protected by LMRA § 7 or arguably prohibited by LMRA § 8.

The question of whether or not the ILA's activity was arguably protected itself turns upon a prior decision of this Court which requires further explication. Indeed, at oral argument, the Alabama Supreme Court requested the parties to file supplemental briefs on the significance of the decision in *Hanna Mining Company* v. *District 2, Marine Engineers Beneficial Association,* 382 U.S. 181 (1965), and in particular whether the Regional Director's ruling that Trione was a supervisor constituted a "clear determina-

[12] The NLRB frequently considers the question of whether appeals for union membership are materially misleading in the context of representation proceedings. Since the Alabama court addressed the identical controversy which might have been presented to the NLRB, state jurisdiction was preempted. *Sears, Roebuck & Co.* v. *Carpenters,* 436 U.S. 180 (1978).

tion" that Davis was not an employee. *See San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 246 (1959).[13]

In *Hanna Mining,* this Court held that "[T]he Board's statement accompanying its refusal to order a *representation election* does resolve the [supervisor] question with the clarity necessary to avoid preemption." 382 U.S. at 190 (emphasis supplied.) In the case at bar, however, no representation petition was ever filed.

Davis argued in effect that the Regional Director's dismissal of Trione's unfair labor practice charge, based upon his finding that Trione was a supervisor, constitutes a clear determination as to the status of all of Ryan-Walsh's superintendents. However, in his letter explaining why Trione's charge was being dismissed, the Regional Director stated only that Trione was a supervisor. The Regional Director made no determination as to the status of Davis or any of the other ship superintendents.[14]

Moreover, the Regional Director's finding as to Trione does not constitute a clear determination even as to Trione's status. Trione never appealed to the NLRB's General

[13] While § 7 of the LMRA grants employees the right to engage in union activities, it does not bestow a similar right on supervisors. This Court ruled in *Hanna Mining Co.* v. *District 2 MEBA,* 382 U.S. 181 (1965), that activity designed to secure organization of supervisors is not even arguably protected by the LMRA. However, *Hanna Mining* did not overrule *Garmon* in which the Court held that absent a "clear determination" by the NLRB that an activity is neither protected nor prohibited by the LMRA, the states are preempted from asserting jurisdiction. 359 U.S. at 246. Accordingly, absent a clear determination by the Board as to the status of the ship superintendents, i.e., whether they are supervisors or employees, the superintendents are arguably employees, and state law is preempted.

[14] Had a representation petition been filed, the Regional Director might have found that the superintendents other than Trione were employees and then ordered an election after excluding Trione from the bargaining unit.

Counsel from the dismissal of his charge by the Regional Director. Even if Trione had appealed, *Garmon* suggests that even an affirmance by General Counsel would not have resulted in a clear determination as to Trione's status. In *Garmon* the Court stated:

> [T]he Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, *or by refusal of the General Counsel to file a charge,* or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance.
>
> * * * *
>
> It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act.

359 U.S. at 245-46. (emphasis supplied.) In *Operating Engineers* the Court did not permit a Regional Director's refusal to issue an unfair labor practice complaint to overcome the fact that activity was arguably prohibited by federal law and so preemptive of state action. Thus, the failure of the Regional Director, or even General Counsel,[15] to issue a complaint in an unfair labor practice case should not constitute a clear determination of supervisory status, so as to avoid preemption.

The "clear determination" doctrine is of nationwide significance and of crucial importance to union organizational activities. Plenary consideration of this case is warranted so that this court can complete the analysis undertaken

[15] It must be emphasized that in the present case there was no appeal to the General Counsel. The case presents the initial question of whether the Regional Director's decision squarely defined Trione's status. Moreover, even if the Regional Director's decision squarely defined Trione's status, an important question is presented as to whether the Regional Director's decision determined the status of the other members of the unit, including the plaintiff, Davis.

in *Garmon* and enunciate definitively what kind of decision and by what level of the NLRB constitutes a clear determination of supervisory status.

Preemption of Innocent Misrepresentation

The Alabama Supreme Court did not come to grips with appellant's argument that, if the ruling of the Regional Director in a collateral case should constitute a clear determination of supervisory status, the state was nonetheless preempted from imposing liability without fault for innocent misrepresentations occuring in the course of organizational activity.

This issue, of course, arose only when the trial judge charged the jury and could not have been waived in the answer as an affirmative defense. The Alabama Supreme Court's refusal to reverse on this ground should be reviewed and reversed.

This Court has held:

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute.

Ray v. *Atlantic Richfield Co.*, 435 U.S. at 158.

And again:

> When state law touches upon the area of these federal statutes, it is 'familiar doctrine' that federal policy 'may not be set at naught, or its benefits denied' by the state law. . . . This is true, of course, even if the state law is enacted in the exercise of otherwise undoubted state power.

Sears Roebuck & Co. v. *Stiffel Company*, 376 U.S. 225, 229 (1964).

It cannot be gainsaid that collective bargaining and the right to organize are the mainstays of our national labor policy, 29 U.S.C. § 151, § 157, imposed by Congress "to the full extent of its constitutional powers under the Commerce Clause". *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 391 (1951). It follows that, even where the states are free to apply their tort law to situations arising in a labor context, they may not do so in such a way as to inhibit organizational rights guaranteed by national labor law.

In the instant case, the application of Alabama's innocent misrepresentation law, Alabama Code § 6-5-101 (1975), conflicts squarely with the union's organizational rights. It permits the union to be penalized for innocent mistakes in the course of its organizational activities. This Court, in an analogous situation, has recognized the preemptive implications of similar state action.

In *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966) the Court held that state actions for defamation arising from a labor dispute are not preempted by the LMRA, provided that plaintiff can show actual malice. The Court defined malice as knowledge of falsity or reckless disregard of whether the statement was true or false. The Court adopted the actual malice standard expressly "to effectuate the statutory design with respect to preemption." 383 U.S. at 65. Just as an attempt by a state to penalize a union for innocent defamation would be preempted under *Linn*, so here the attempt by Alabama to penalize appellant for innocent misrepresentation runs afoul of the Supremacy Clause.

Thus, even if the Alabama law of misrepresentation is not totally preempted, the Alabama courts should have applied an intentional wrongdoing standard. Instead, the trial judge charged the jury on intentional, reckless, and innocent misrepresentation. Since a general verdict was returned, it

cannot be determined whether the jury based their verdict on a finding of intentional misrepresentation or on the federally preempted innocent misrepresentation theory.

Preemption of Excessive Verdicts

The issue of whether an excessive award of damages under otherwise valid state law violates the Supremacy Clause is a variant of the rule that state law becomes preempted to the extent it conflicts with federal law. *See* p. 14 *supra*. The Alabama Court did not address this question, despite the fact that the preemption argument could not be waived until *after* the jury returned its excessive verdict.[16]

Although the states may be entitled to render purely compensatory damages for torts committed in the course of a union's exercise of § 7 rights, when the awards go beyond mere compensation they take on the character of a penalty for the exercise of those rights. Again, this Court has recognized the problem. In *Farmer* v. *Carpenters,* 430 U.S. 290 (1977), the Court held that a state action for intentional infliction of mental distress was not preempted where a union had engaged in extreme and outrageous conduct in administering the hiring hall. However, the Court was careful to note twice that state trial courts are under a responsibility to assure that the damages awarded are not excessive. *Id.* at 299, 306. Each reiteration was in the context of preventing state interference with union rights under national labor law.

If state juries are permitted to impose excessive verdicts on labor organizations, the danger of interference with the employees' federally protected right of self-organization and right to engage in collective bargaining is self-evident. Under the Supremacy Clause of the U.S. Constitution, the

[16] In the case at bar, since Davis lost only three months wages or approximately $5,000.00, the verdict of $75,000.00 was clearly excessive.

states are prohibited from interfering with these federally protected rights. The Alabama Supreme Court's failure to correct this error should be reviewed and reversed.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction of this appeal and grant plenary consideration, with briefs on the merits and oral argument.

Dated: August 7, 1985

Respectfully submitted,

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APPENDIX

Decision of the Supreme Court of Alabama
Filed May 10, 1985

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1984-85

83-710

International Longshoremen's Association, etc.

v.

Larry Davis

Appeal from Mobile Circuit Court

JONES, *Justice.*

The threshold issue is whether federal preemption is a waivable defense. Plaintiff argues that Defendant Union's post-trial allegation of federal preemption was insufficient to preserve the issue for our review. On the other hand, Defendant Union argues that asserting federal preemption in a post-trial JNOV motion is sufficient to preserve the issue for appellate review, because the National Labor Relations Act preempts the state courts of subject matter jurisdiction, the lack of which may never be waived and thus can be asserted at any time. We hold that, under the circumstances of this case, federal preemption is an affirma-

tive defense[1] which not only can be waived, but must be affirmatively pleaded in order to avoid waiver. Thus, Defendant Union's JNOV motion alleging federal preemption was insufficient to preserve that issue for our review.

In so holding, we are not unmindful of contrary holdings of other state courts supporting Defendant Union's position that the National Labor Relations Act preempts a state's subject matter jurisdiction. See, *e.g., Consolidated Theatres* v. *Theatrical Stage Employees' Union, Local 16,* 69 Cal. 2d 713, 73 Cal. Rptr. 213, 447 P.2d 325 (1968); *Chicago & North Western Railway Co.* v. *La Follette,* 27 Wis. 2d 505, 135 N.W. 2d 269 (1965); *General Building Contractors' Association* v. *Local Unions Nos. 542, 542-A and 542-B,* 370 Pa. 73, 87 A. 2d 250 (1952).

Each of these courts asserts its holding of federal preemption summarily and without supporting precedent. Once the "subject matter" premise is accepted, the result that the preemption issue may be raised for the first time on appeal and judicially reviewed on its merits is a foregone conclusion. Subject matter jurisdiction can neither be conferred by agreement nor can it be waived. Indeed, it is incumbent upon the court to notice subject matter jurisdiction *sua sponte.*

It is not the conclusion, given the assumed premise, with which we disagree. Our disagreement consists in *what* is preempted. It is not the circuit court's subject matter jurisdiction to adjudicate a damage claim for the tort of fraud—even if it arises in the context of a labor-related dispute

[1] Although federal preemption is not specifically listed in A.R. Civ. P. 8(c) as an affirmative defense, it quite obviously falls within the nature of those defenses specifically listed. See, also, *Powell* v. *Phenix Federal Sav. & Loan Ass'n,* 434 So. 2d 247 (Ala. 1983).

—that is preempted. Rather, it is the state court's *exercise* of that power that is subject to preemption.[2]

This distinction between federal preemption of subject matter jurisdiction and preemption of the state court's exercise of its authority is more than a mere play on words. It goes to the very nature and character of the power of the state courts to function within the constitutionally created system of federalism, invoking significant public policy considerations. Undisputedly, the Supremacy Clause authorizes the United States Congress, if not otherwise constitutionally proscribed, to legislate in matters in which the states are also empowered to act. The federal legislation (or regulations pursuant thereto) may authorize concurrent jurisdiction (*e.g.,* Federal Employers Liability Act); it may preempt state law (*e.g.,* 12 C.F.R. § 545.8-3(f)(1982));[3] it may preempt the state court's exercise of

[2] It is important to note that our reference to "subject to preemption" preserves the distinction between the procedural question of when the issue must be raised to invoke appellate review and the resolution of the preemption issue on the merits. The *La Follette* court, *supra,* recognized and applied this distinction when it accepted for review the issue raised initially on appeal, but upon review on the merits rejected the preemption issue as a defense.

Likewise, if we were to rule on the merits, we could not find that the state court's jurisdiction is federally preempted. The instant facts fall squarely within the "peripheral concern" exception to federal preemption of state jurisdiction of labor-related disputes. *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 243-44 (1959). The National Labor Relations Board has already determined that an employer's supervisors are not protected by the Labor Management Relations Act. Thus, in this case, Plaintiff has no remedy before the NLRB, and this dispute, although somewhat labor-related, is, at most, only of "peripheral concern" to the NLRB. See, *e.g., Linn* v. *United Plant Guard Workers Local 114,* 383 U.S. 53 (1966).

[3] While *Powell,* see n. 1, dealt with federal preemption of state law rather than preemption of subject matter jurisdiction, its holding, requiring that the preemption defense be raised in the trial court, is totally consistent with the instant opinion.

its otherwise valid jurisdiction over a particular field of law (*e.g.*, National Labor Relations Act); or it may create a body of law unknown to state law (*e.g.*, Bankruptcy Reform Act of 1978).

To be sure, the Bankruptcy Reform Act is an excellent example of pure subject matter jurisdiction. If a state court "adjudicates" one of its citizens "a bankrupt," such adjudication would be subject to attack as void at any time by any affected party, or by the *sua sponte* action of another court. The very subject matter of bankruptcy has been preempted by federal law. In like manner, if a state court of limited jurisdiction (*e.g.*, an Alabama district court) convicted an accused of capital murder and sentenced him to die, the conviction and sentence would be void for lack of subject matter jurisdiction.

Central to our holding is the general jurisdiction of the Mobile Circuit Court, Art. VI, § 6.04, Amendment 328, Ala. Const. 1901, and the nature of the claim. This is an ordinary misrepresentation suit filed in a court of general jurisdiction. Clearly, the Mobile Circuit Court has jurisdiction over claims for damages based on allegations of misrepresentation. Code 1975, § 6-5-101, *et seq.*

We contrast the instant case with a bankruptcy suit filed in a state circuit court or a capital murder case tried in a state district court. In both instances, neither court has subject matter jurisdiction. The state circuit court, although a court of general jurisdiction, has no jurisdiction over the bankruptcy suit because remedies of this nature exist only by virtue of federal law and exclusively in the federal forum. To like effect, the district court is a court of limited jurisdiction and by state law has no power to try capital murder cases. In neither of these examples could subject matter jurisdiction be conferred by agree-

ment, and thus the defense of lack of subject matter jurisdiction could not be waived; therefore, the judgments could be set aside at any time as void, either on direct or on collateral attack, and whether or not the issue of jurisdiction was raised in the trial court.

We turn now to the public policy consideration invoked by Appellant's argument for subject matter jurisdiction and the right to present this issue for appellate review on the merits. Indeed, the instant case is illustrative of these policy considerations, for not until the completion of a trial of several days and an adverse verdict did the Union allege federal preemption. Not only is judicial economy at stake, but it is grossly unfair to the trial judge whose ruling with respect to preemption was never invoked. When a party, as "sophisticated" in federal labor law as is the Defendant Union, first alleges federal preemption at the post-trial stage, it is more than mere speculation to assume that it was a deliberate attempt to have "two bites at the same apple"—the two bites being litigation in state court on the merits, and, failing there, a post-judgment attack on grounds of subject matter jurisdiction.

To hold otherwise, under these circumstances, and allow the union to gamble on the result and then belatedly assert the preemption defense is to impung the integrity of the judicial process. To one who would attempt two such bites at the apple, we are constrained to reply simply, "Not in our orchard."

We have carefully reviewed the Appellant's alternative state law grounds for reversal and find each of them to be without merit.

AFFIRMED.

Decision of the Supreme Court of Alabama
Filed May 10, 1985

Maddox, Faulkner, Almon, Embry, Beatty, and Adams, JJ., concur.

Tobert, C. J., and Shores, J., concur in the result.

SHORES, *Justice* (concurring in the result):

I have been cited to no case, nor have I found one, which convinces me that the plaintiff's state action for fraud and misrepresentation is preempted by federal law. For this reason, I would not base the decision to affirm the judgment on the ground that the defendant waived its defense by not raising it in time, but would simply hold that federal preemption is not a valid defense under the facts of this case.

Torbert, C.J., concurs.

MOTION

No. 85-217

In The

Supreme Court of the United States

October Term, 1985

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Appellant,

v.

LARRY DAVIS

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

MOTION TO DISMISS APPEAL FROM STATE COURT

Attorney for Appellee

BAYLESS E. BILES
WILKINS, BANKESTER & BILES, P.A.
Post Office Box 1140
Bay Minette, Alabama 36507
(205) 937-7024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Appellant,

v.

LARRY DAVIS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

MOTION TO DISMISS APPEAL FROM STATE COURT

Appellee, Larry Davis, in the above entitled case, moves to dismiss the appeal on the following grounds:

1. The Federal Questions sought to be reviewed were neither timely nor properly raised nor expressly passed on by the Courts of Alabama.

2. The appeal does not present a substantial Federal Question.

3. The Alabama Supreme Court decision is based upon a substantial and sufficient non-Federal ground.

STATEMENT

The Appellee filed this action for fraud and misrepresentation on October 5, 1981, in the Circuit Court of Mobile County, Alabama. The Appellant filed an Answer in which it failed to raise any Federal Constitutional defenses. The Appellant, under the Alabama Rules of Civil Procedure, filed a Motion for Summary Judgment and again failed to raise any Federal Constitutional issues. Summary Judgment was denied and this case proceeded to trial before a jury. At the close of the Appellee's case in the trial court, the Appellant filed a Motion for Directed Verdict and again failed to raise any Federal Constitutional issues. At the close of the Appellant's case at the trial court

level, the Appellant again filed a Motion for Directed Verdict and again failed to raise any Federal Constitutional issues. The jury returned a verdict for the Appellee and the Appellant filed a Motion for Judgment Non Obstante Veredicto (J.N.O.V.), or, in the Alternative, a New Trial. It was in this Motion, after having had the legal right and opportunity to raise the Federal Constitutional issue in several pre-trial and trial Answers and Motions, that the Appellant first raised the issue of Federal preemption. The Motions for J.N.O.V. and new trial were denied and the Appellant entered appeal to the Supreme Court of Alabama. The Appellant raised the Federal preemption issue on appeal to the Supreme Court of Alabama. That Court, sitting en banc, refused to decide the issue of Federal preemption on the

ground that, under the Alabama Rules of Civil Procedure, the issue was not sufficiently raised at the trial level to preserve it for Appellate review. (Appendix to Appellant's Jurisdictional Statement at 1a-2a).

Appellant failed to seek rehearing in the Supreme Court of Alabama and appealed to this Court.

QUESTIONS PRESENTED

1. Where Federal Questions are not raised at the state court level until Motion for j.n.o.v. or new trial, which Motion was filed after a jury verdict against the Appellant, and where the Supreme Court of Alabama failed to pass on the Federal

Questions, does the jurisdiction of the Supreme Court of the United States attach on appeal from the State Supreme Court?

2. Whether there is a substantial Federal Question involved when a State court of general jurisdiction exercises the jurisdiction it is granted by the State Constitution and Statutes and the Appellant fails to raise Federal Questions timely under the State procedural law and the Supreme Court of the State decides the case solely upon State procedural law?

3. Where a State Supreme Court

decides a case solely upon the Appellant's failure to timely raise Federal Questions at the State Court level in accordance with State procedural law, is the State Court decision based upon a substantial and sufficient nonFederal ground?

ARGUMENT

I. The Questions Which the Appellant Seeks to Have Reviewed Were Not Properly Raised and Preserved Below.

The Appellant contends that Federal preemption as applied to National Labor Law acts to preclude

State Courts from exercising jurisdiction over ordinary fraud and misrepresentation actions. The Circuit Court of Mobile County, Alabama, where this suit originated, clearly has jurisdiction over such suits. Art. VI, §6.04, Amendment 328, Ala. Const. 1901 and §6-5-101, et seq., Code of Alabama (1975).

Appellant filed an Answer to Appellee's Complaint and failed to raise any Federal Questions in the form of affirmative defenses and, for that matter, failed to mention a Federal Question defense at all. Appellant filed Motions for Directed Verdict at the close of Appellee's case and at the close of all the evidence and never raised the Federal Questions it seeks this Court to consider. It was not until after Appellant submitted itself

to the jurisdiction of the Mobile Circuit Court and after the jury returned a verdict against the Appellant, that it sought to raise the Federal preemption issue.

The Alabama Rules of Civil Procedure require an affirmative defense to be specifically set out in a Defendant's Answer. Alabama Rules of Civil Procedure 8(c). The Supreme Court of Alabama held, in its decision in the case at bar, that the Federal preemption defense ". . . is an affirmative defense which not only can be waived, but must be affirmatively pleaded in order to avoid waiver." (Appendix to Appellant's Jurisdictional Statement, 1a-2a).

The Supreme Court of Alabama thus affirmed the judgment below in favor of

the Appellee and never addressed the merits of the Appellant's Federal preemption defense except in a footnote. In footnote (2) of the Alabama Supreme Court decision, the Court stated that if it were to pass on the merits of the Appellee's Federal preemption issues, it would hold that the Appellant's cause of action for misrepresentation was not preempted because "[T]he instant facts fall squarely within the 'peripheral concern' exception to Federal preemption of State jurisdiction of labor-related disputes. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959)." (Footnote 2 in Appendix to Appellant's Jurisdictional Statement, p. 3a).

In Herndon v. Georgia, 295 U.S. 441, 55 S. Ct. 794, 79 L.Ed. 1530

(1935), this Court decided the issue raised in this Motion under facts strikingly similar to the facts in the case at bar. In Herndon, supra., the Appellant had not raised Federal Questions timely under the procedural law of the State of Georgia and the Georgia Supreme Court refused to pass on the Federal Questions. On appeal to this Court, it was held as follows:

> "But, in addition to the insufficiency of the specification, the adverse action of the trial court was not preserved by exceptions pendente lite or assigned as error in due time in the bill of exceptions, as the settled rules of the State practice require. In that situation, the State Supreme Court declined to review any of the rulings of the trial court in respect of that and other preliminary issues; and this determination of State Court is conclusive here. (Citations omitted.)

The Federal Question was never properly presented to the State Supreme Court unless

upon Motion for Rehearing; and that Court then refused to consider it. The long established general rule is that the attempt to raise a Federal Question after judgment, upon a Petition for Rehearing, comes too late, unless the Court actually entertains the question and decides it. (Citations omitted.)" Herndon, supra., 79 L.Ed. at 1532.

This Court has repeatedly refused to exercise jurisdiction where a Federal Question has not been both raised and decided in the State Court below. Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527, 535 (1983); Connecticut v. Johnson, 460 U.S. 73, 103 S. Ct. 969, 74 L.Ed.2d 823 (1983); Crowell v. Randell, 10 Pet 368, 9 L.Ed. 458 (1836); McGoldrick v. Compagnie Generale, 309 U.S. 430, 60 S. Ct. 670, 84 L.Ed. 849 (1940); State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 154, 65 S. Ct. 573, 89 L.Ed. 812 (1945).

The Supreme Court of Alabama refused to address the Federal preemption issue on the ground that it was improperly and untimely raised and thus there is no Federal Question for this Court to decide. Furthermore, it is pointed out, that the Supreme Court of Alabama failed to pass upon any of the five (5) questions listed under the "Questions Presented" portion of the Appellant's Jurisdictional Statement.

II. The Appeal Presents No Substantial Federal Question.

The Federal preemption issues here asserted by the Appellant were never passed upon by the Supreme Court of Alabama. This case was decided upon the Appellant's failure to abide by the procedural requirements of the Courts in the State of Alabama. The Federal

preemption issues were never reached as they were not properly preserved for review by the Supreme Court of Alabama. (Appendix to Appellant's Jurisdictional Statement). Therefore, there is no Federal Question before this Honorable Court. Herndon v. Georgia, 295 U.S. 441, 55 S. Ct. 794, 79 L.Ed. 1530 (1935).

III. The State Court Judgment Rests Upon an Independent Non-Federal Ground Adequate to Support it.

This Court has repeatedly held that State procedural defaults constitute an adequate and independent State law ground which bars review. Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 25 L.Ed.2d 785 (1970); Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822, 9 L.Ed.2d 837 (1963). In the case at

bar, the Appellant submitted itself to the jurisdiction of the Circuit Court of Mobile County, Alabama, without objection. The Appellant's Answer and Pre-Answer Motions failed to question jurisdiction. Thus, the Appellant presented itself to litigation under the Alabama Rules of Civil Procedure and the common law precedents of the State of Alabama. Rule 8(c) of the Alabama Rules of Civil Procedure requires a party to set forth affirmatively any matter constituting an avoidance or affirmative defense. Furthermore, during the pendency of the case at bar, while the Appellant still had the legal right to amend its Answer to include the defense of Federal preemption, the Supreme Court of Alabama announced the following rule in Powell v. Phenix Federal Savings & Loan Association, 434 So.2d 247, 251 (Ala.

1983):

> ". . . federal preemption operates as an affirmative defense that is waived if not pleaded."

This procedural rule protects the adequate State interest in judicial economy and rightfully requires the raising of an affirmative defense prior to expensive and time consuming litigation which might otherwise be avoided. This point is correctly noted in the Alabama Supreme Court's decision in this case. (Appendix to Appellant's Jurisdictional Statement, p. 5a).

CONCLUSION

For all of the foregoing reasons, Appellee moves that this appeal be dismissed.

Dated: September 3, 1985.

Respectfully submitted,

Bayless E. Biles
Wilkins, Bankester & Biles, P.A.
Attorneys at Law
Post Office Box 1140
Bay Minette, AL 36507

(205) 937-7024

Attorney for Appellee

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 5 day of September, 1985, served a copy of the foregoing Motion to Dismiss Appeal from State Court on

Thomas W. Gleason, Esquire, 90 Broad Street, Suite 600, New York, New York 10004, by mailing the same by United States mail, properly addressed, with first class postage prepaid.

Bayless E. Biles
Attorney for Appellee

JOINT

APPENDIX

(3)

No. 85-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Appellant,

v.

LARRY DAVIS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

JOINT APPENDIX

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TABLE OF CONTENTS

Circuit Court of Mobile County Docket Entries

CONSOLIDATED FOR TRIAL

State of Alabama
Supreme Court
Dept. of Court Mgmt.
FORM SC-C-5A 1/77

CIVIL CASE ACTION SUMMARY

TRIAL JUDGE: KITTRELL

CV 81 002314
ID YR NUMBER

IN THE CIRCUIT COURT OF MOBILE COUNTY

ORI 002015J CASE NUMBER CV 81 002314
ID YR NUMBER

PLAINTIFF'S NAME	DEFENDANT'S NAME
LARRY DAVIS	INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

PLAINTIFF'S ATTORNEY
WILKINS, BANKESTER & BILES, P.A.
BY: Claude E. Bankester Bayless Biles
P. O. Box 1140
Bay Minette, Alabama 36507

DEFENDANT'S ATTORNEYS
FLOYD G. HEWITT, JR.
P.O. Box 543, Biloxi, Miss 39533
KENNETH O. SIMON
J. F. JANECKY

FILING DATE
10/5/81

CASE TYPE	AMOUNT
false representation	$500,000.00

JUDGE ID	JURY	PLAINT INDIG.	DATES
NAME	YES [×]	YES ☐	SET FOR TRIAL

Circuit Court of Mobile County Docket Entries

DATE	BENCH NOTES, ORDERS, JUDGMENTS, ACTIONS, MINUTES, ETC., RECORD OF:
10– 5–81	Complaint & Summons sent by Certified Mail, Return Receipt Requested, Addressed to: International Longshoremen's Association, c/o J. H. Raspberry, District President, 1821-27 The Strand, Galveston, Texas 77550
	**C&S served on International Longshoremen's Association by Certified Mail, Receipt signed by J. H. Raspberry on October 26, 1981.
11–17–81 n/a J.sec.	Defendant's motion for Court to grant an additional 30 days to answer the complaint.
	December 11, 1981—Motion Granted.
12–15–81	Answer of defendant
12–15–81	Defendant's notice of request for production of documents and things to plaintiff
12–15–81	Defendant's request for production of documents and things to plaintiff.
12–15–81	Defendant's first set of interrogatories to the plaintiff.
12–15–81	Defendant's notice of interrogatories to the plaintiff.
2–17–82	Notice of taking deposition of Larry Davis
3 –4–82	Plaintiff's response to request for production of documents
3 –8–82	Plaintiff's answers to interrogatories.
4 –2–82	Deposition of Larry James Davis.
5 –5–82	General Pre-Trial Order

Circuit Court of Mobile County Docket Entries

DATE	BENCH NOTES, ORDERS, JUDGMENTS, ACTIONS, MINUTES, ETC., RECORD OF:
6–22–82	Defendants' motion for court to enter a summary judgment or in the alternative, a partial summary judgment.
	August 20, 1982—Motion submitted.
	September 8, 1982—Motion Denied.
7–16–82	Plaintiff's supplemental answers to interrogatories.
7–29–82	Affidavit in opposition to motion for summary judgment or in the alternative partial summary judgment.
8–16–82 n/a J.sec.	Plaintiff's motion for court to consolidate this case with CV-82-000908 for trial. September 9, 1982—Motion Granted.
9– 2–82	Joint motion of parties for court to continue the trial from September 13, 1982.
	September 8, 1982—Motion Granted.
9– 9–82	Defendant's memorandum in support of the motion for summary judgment, or in the alternative, partial summary judgment of the defendant, International Longshoremen's Association.
8–16–82	Defendant's motion for court to reconsider its previously filed request for oral argument in opposition to request of plaintiff to consolidate trial of his cause with trial of CV-82-000908.
	February 18, 1983—Motion Denied.
9–28–82	Deposition of Johnny J. Amacker.

Circuit Court of Mobile County Docket Entries

DATE	BENCH NOTES, ORDERS, JUDGMENTS, ACTIONS, MINUTES, ETC., RECORD OF:
9–28–82	Deposition of James H. Baker, III.
9–28–82	Deposition of John William Johnson, Sr.
9–28–82	Deposition of Michael Arnold Young.
	May 16, 1983—Case crowded out, Court in trial of another civil matter.
8–12–83	Defendant's second set of request for production to Plaintiff Ben Trione
8–12–83	Defendant's request for admissions to Ben Trione
8–12–83	Defendant's second set of interrogatories to plaintiff Ben Trione
8–12–83	Defendant's motion for court to dismiss the complaint or in the alternative, to sever and continue complaint and trial of Ben Trione from Larry Davis.
	October 28, 1983—Motion to dismiss complaint of Ben Trione (Plaintiff in CV-82-000908) Granted.
11– 8–83	Appearance of counsel for the Defendant.
11–15–83	Defendant's motion for directed verdict at the close of the plaintiff's case.
	November 15, 1983—Motion denied.
11–15–83	Defendant's motion for directed verdict at the close of all the evidence.
	November 15, 1983—Motion denied.
11–16–83	2 jury charges given for defendant.

Circuit Court of Mobile County Docket Entries

DATE	BENCH NOTES, ORDERS, JUDGMENTS, ACTIONS, MINUTES, ETC., RECORD OF:
11–16–83	8 jury charges refused defendant.
	November 16, 1983—Jury and verdict for the plaintiff and against the defendant for the sum of $75,000.00.
	This day in open Court, a lawful jury, having heard the evidence and the charge of the Court, did return the following verdict: "We, the jury, find for the plaintiff, against the defendant and assess damages at $75,000"; and the Court now desires to enter a final judgment in this case. It is therefore ordered and adjudged by the Court that a final judgment in favor of the plaintiff, Larry Davis, and against the defendant, International Longshoremen's Association, in the sum of $75,000.00, be and hereby is entered with costs taxed in favor of the plaintiff, Larry Davis, and against the defendant, International Longshoremen's Association, for the recovery of which let execution issue in accordance with Rule 62(a) of the Alabama Rules of Civil Procedure.
12–13–83	Defendant's motion for court to enter an order of judgment in favor of Defendant, notwithstanding the verdict in this case or in the alternative set aside the verdict and order a new trial.
	February 17, 1984—Motion Denied.
3–26–84	Notice of Appeal to the Supreme Court filed this dated by the defendant from the Jury and Verdict of November 16, 1983, finding in

Circuit Court of Mobile County Docket Entries

DATE	BENCH NOTES, ORDERS, JUDGMENTS, ACTIONS, MINUTES, ETC., RECORD OF:
	favor of the plaintiff or the sum of $75,000.00, and from the order of February 17, 1984, denying defendant's motion to enter a judgment in favor of defendant, notwithstanding the verdict or in the alternative to set aside the verdict and order a new trial.
3-26-84	Security for costs filed with Nettles, Barker & Janecky, By: J. F. Janecky.
3-26-84	Designation of Record on Appeal.
3-26-84	Supersedeas Bond in the amount of $93,750.00, filed with The Aetna Casualty and Surety Company as surety.
3-26-84	Letter of Transmittal.
3-26-84	$100.00 docket fee.
4-20-84	Appeal Docketed. No. 83-710.
4-24-84	Judge's order granting Trial Clerk 14 day extension.

Supreme Court of Alabama Docket Entries

83-710

470 So.2d—1215

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ETC. — LARRY DAVIS

Clerk
Mobile Circuit Court CV-81-02314

Telfair J. Mashburn Judge

Floyd G. Hewitt, Jr.
P. O. Box 543
Biloxi, MS 39533

J. F. Janecky
P. O. Box 2987
Mobile, AL 36652
432-8786

Briefs Filed: 10-16-84
(9 copies)

Reply Briefs Filed: 11-30-84
(9 copies)

Claude E. Bankester
P. O. Box 1140
Bay Minette, AL 36507
Bayless Biles
937-7024 or
947-2244

Briefs Filed: 11-13-84
(9 copies)

Supplemental Briefs Filed:
3-25-85 (9 copies)

Judgment Date
November 16, 1983 PJO: Dec. 13, 1983 Feb. 17, 1984

Judgment Appealed From exceeds $10,000

Notice of Appeal filed in trial Court March 26, 1984

Security for Costs: appt w/w — Docket Fee $100
4/12/84co

Supreme Court of Alabama Docket Entries

Certificates of Completion

5–10	Clerk's Record		5– 8–84
9–13–84	Reporter's Transcript		9–10–84
9–20–84	Record on Appeal		9–17–84
10–22–84	Supp. Clerk's Rcd		10–18–84

Extensions of Time-Briefs

10–15	Appellant cbt 10-9-84		10–22–84
10–30–84	Appellee		11–13–84
11–20–84	Appellant Reply cbt 11-19-84		12– 4–84

Extensions of Time

4–24–84	TJ/Clerk's Record	14d	5– 7–84
5–23	TJ/Reporter's Transcript	28	
	TJ/Reporter's Transcript		
	TJ/Record on Appeal		
6–25	SC/CR		7–30–84
8/ 2	SC/CR	28d	8/27/84
8/30	SC/CR	14	9–10–84
12–18–84	Record File A/C/N		2u/ak
	Supplemental Vol.		
	Appendix Filed A/N		Exhibits
12–18–84	Second Copy Record Filed		2u/ak
10–16–84	Oral Argument Requested by Appt		Denied
	Oral Argument Granted		
	O/A Set	1:30	3–18–85

Supreme Court of Alabama Docket Entries

3–18–85	Submitted Argued & Submission Withheld Division Torbert, C.J., Maddox, Jones, Shores & Beatty, JJ.
4– 1–85	Submitted after filing letter briefs
5/10/85	Judgment AFFIRMED
5/10/85	Opinion By JONES, J.
5/10/85	Concurrences MA, FA, AL, EM, BE & AD, JJ., CONCUR; TOR, CJ., & SH, J., CONCUR IN THE RESULT
	Application for Rehearing Filed
	Action on Rehearing
MAY 30 1985	Certificate of Judgment Issued
5–30–85	Library Fee Transferred-$5.00
10–18–84	Letter from Ben Harris recommending and introducing Charles R. Goldburg to appear in case pro hac vice in association with J. F. Janecky of Mobile. RGE-sjm
3–18–85	Submission withheld 7 days for appellee to submit letter brief and 7 days for appts to reply.
5/23/85	1cc Appellant's Notice of appeal filed with USSC/awk-dn

Appellant's Counsel Cont'd

Thomas W. Gleason 212 425-3240.
Chrles R. Goldburg
Susan G. Barres
90 Broad Street
Suite 600
NY, NY 10004

Suppl. letter BRIEFS FILED: 4-4-85 (10 copies)

Unfair Labor Practice Charge Filed by Ben Trione

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 15-CA-8138

Date Filed April 24, 1981

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: Ryan-Walsh Stevedoring Co., Inc.

b. Number of Persons Employed: 700 (approximately)

c. Address of Establishment (Street and number, city, State, and ZIP code)

d. Employer Representative to Contact: B. H. Green, Jr.

e. Phone No.

f. Type of Establishment (Factory, mine, wholesaler, etc.): Stevedore

g. Identify Principal Product or Service: Loading and unloading ships

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since, on or about April 13, 1981, the above named employer interfered with the rights of its employees to engage in concerted activity for mutual aid and protection; and by discrimination in regard to tenure and conditions of employment, discouraged membership in or adherence to an organization of its employees; in that on or about said date said employer discharged employee Ben Trione for the reasons aforesaid

APR 24 10 43 AM '81
NEW ORLEANS, LA
NLRB
REGION 15

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Ben Trione, an individual

4a. Address (Street and number, city, State, and ZIP code)

East Park Plaza
7 Marker Street Monrovia, Alabama 36559

4b. Telephone No.

205
928-1161

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Gregory B. Stein (Signature of representative or person filing charge) (Title, if any)

Gregory B. Stein
405 Van Antwerp Building
P.O. Box 1051
Address Mobile, Alabama 36633 205 433-2000 (Telephone number) 4/23/81 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

Complaint

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, an unincorporated association or a corporation, the exact legal status of which is unknown, but will be supplied by amendment when ascertained,

Defendant.

COMPLAINT

1. Prior to April 12, 1981, and on that date, Plaintiff had been and was employed by Ryan-Walsh Stevedoring Company, Inc. (hereafter Ryan-Walsh), a corporation, in Mobile, Alabama, as a ship superintendent.

2. As a ship superintendent for Ryan-Walsh, Plaintiff was a supervisor within the meaning of the National Labor Relations Act, 29 U.S.C., §152(11), and could not legally join Defendant Union or the Locals of Defendant Union representing other employees of Ryan-Walsh for collective bargaining purposes, to-wit, Local 1410 and Local 1985.

3. In an attempt to organize the ship superintendents employed by Ryan-Walsh, Defendant, on or about April 12, 1981, requested of Plaintiff and other ship superintendents employed by Ryan-Walsh that Plaintiff and such other employees execute a charter application to Defendant for the "Walking Foreman in the Port of Mobile," and

pledge cards of Defendant, and represented to Plaintiff and other ship superintendents employed by Ryan-Walsh that Plaintiff and other ship superintendents could legally become members of Defendant Union; that they would be protected by Defendant against any action taken by Ryan-Walsh against Plaintiff and other ship superintendents for their participation in organizing such ship superintendents for Defendant Union; and that if Plaintiff was fired by Ryan-Walsh, Defendant would get his job back with back pay.

4. The representations made by the Defendant were false and the Defendant knew that they were false.

5. Plaintiff believed the representations and in reliance upon them signed the pledge and charter application referred to above, and refused to cross the picket line set up by Defendant. Plaintiff's employment was then terminated by Ryan-Walsh because of his said participation in the attempted organization of said ship superintendents.

6. Because of his being discharged by Ryan-Walsh, Plaintiff was unable to obtain employment with anyone else in a stevedoring or related job, has lost wages, has been embarrassed and humiliated, and has suffered great mental pain and anguish.

WHEREFORE, Plaintiff demands judgment against Defendant for FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS and costs.

WILKINS, BANKESTER & BILES, P.A.

BY: /s/ CLAUDE E. BANKESTER
CLAUDE E. BANKESTER
Attorney for Plaintiff
P. O. Box 1140
Bay Minette, Alabama 36507

Plaintiff respectfully demands a trial by jury in this cause.

/s/ CLAUDE E. BANKESTER
Attorney for Plaintiff

SERVE DEFENDANT BY REGISTERED MAIL AT:

c/o J. H. Raspberry
District President
International Longshoremen's
Association
1821-27 The Strand
Galveston, Texas 77550

Answer

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

VS.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, an unincorporated association or a corporation, the exact legal status of which is unknown, but will be supplied by amendment when ascertained

Defendant.

ANSWER

TRIAL BY JURY REQUESTED

Comes now INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, a Defendant named in the above styled and numbered cause, by and through its counsel, and files this its Answer to the Complaint and would show the following, to-wit:

FIRST DEFENSE

This Court lacks jurisdiction over the person of the INTERNATIONAL LONGSHOREMEN'S ASSOCIATION.

SECOND DEFENSE

There is an insufficiency of process and an insufficiency of service of process on the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION.

Answer

THIRD DEFENSE

The Complaint fails to state a claim upon which relief can be granted or it fails to state a cause of action against the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION.

FOURTH DEFENSE

Now answering the allegations of the Complaint, paragraph by paragraph, the Defendant says as follows, to-wit:

I.

Answering the allegations contained in paragraph 1. of the Complaint, the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION is without knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph, and, therefore, denies same.

II.

Answering the allegations contained in paragraph 2. of the Complaint, the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION is without knowledge or information sufficient to form a belief as to whether or not the Plaintiff was a supervisor within the meaning of Section 152(11) of the Labor Management Relations Act of 1947 (29 U.S.C. 152(11)) and, therefore, denies same. Further, the Defendant specifically denies that Section 152(11) of said Act prohibits any individual employed as a supervisor from either becoming or remaining a member of a labor organization; providing, however, that no employer subject to said Act can be compelled to deem said individual, if, in fact, he is a supervisor, as an employee for collective bargaining purposes. The Defendant denies each and every remaining material allegation contained in said paragraph.

Answer

III.

Answering the allegations contained in paragraph 3. of the Complaint, the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION denies ever having any communication of contacts with the Plaintiff or anyone else; specifically denies each and every allegation contained in said paragraph; and demands strict proof thereof. Further, the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION would move to strike any and all references by the Plaintiff to "other ship superintendents" or "other employees" in said paragraph as they are not parties to the suit and the Plaintiff has no standing to make a claim on their behalf.

IV.

Answering the allegations contained in paragraph 4. of the Complaint, the Defendant denies ever having made any representations to the Plaintiff and, therefore, must also deny each and every material allegation contained in said paragraph.

V.

Answering the allegations contained in paragraph 5. of the Complaint, the Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained therein and, therefore, denies same.

VI.

The Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, denies each and every material allegation contained in paragraph 6. of the Complaint, and demand strict proof thereof.

VII.

AND, answering the last unnumbered paragraph of the Complaint, the Defendant, INTERNATIONAL LONGSHOREMEN'S

Answer

ASSOCIATION denies all of same and denies that the Plaintiff is entitled to any judgment in any amount whatsoever of or from the Defendant and the Defendant respectfully requests to be dismissed herefrom with its costs.

Respectfully submitted,

BRYAN, NELSON, ALLEN, SCHROEDER AND COMPTON

By: /s/ FLOYD G. HEWITT, JR.
FLOYD G. HEWITT, JR.

NETTLES, COX & BARKER

By: /s/ KENNETH O. SIMON
KENNETH O. SIMON
Attorneys for the Defendant
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

Answer

CERTIFICATE OF SERVICE

I, FLOYD G. HEWITT, JR., of the law firm of BRYAN, NELSON, ALLEN, SCHROEDER AND COMPTON, attorneys for the Defendant in the above styled and numbered cause, do hereby certify that I have this day forwarded, via United States mail, postage prepaid, a true and correct copy of the above and foregoing Answer to the Honorable Claude E. Bankester, attorney for the Plaintiff, at his usual and regular mailing address of Post Office Box 1140, Bay Minette, Alabama 36507.

THIS, the 14th day of December, 1981.

/s/ FLOYD G. HEWITT, JR.
FLOYD G. HEWITT, JR.

FLOYD G. HEWITT, JR.
BRYAN, NELSON, ALLEN, SCHROEDER
AND COMPTON
Attorneys at Law
Post Office Box 543
Biloxi, MS 39533

KENNETH O. SIMON
NETTLES, COX & BARKER
Attorneys at Law
Post Office Box 2987
Mobile, Alabama 36652
Telephone: (205) 432-8786

Defendant's Motion for Summary Judgment

IN THE
CIRCUIT COURT OF MOBILE COUNTY, ALABAMA
Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

versus

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, an unincorporated association or a corporation, the exact legal status of which is unknown, but will be supplied by amendment when ascertained,

Defendant.

MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

Comes now INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, the Defendant in the above styled and numbered cause and, pursuant to Rule 56, of the Alabama Rules of Civil Procedure, respectfully moves this Court to enter Summary Judgment, or, in the Alternative, Partial Summary Judgment, in favor of this Defendant on the grounds that there is no genuine issue as to any material fact, and this Defendant is entitled to judgment as a matter of law. This Motion is based upon (1) the face of the Complaint, (2) the deposition of the Plaintiff, LARRY DAVIS, and (3) responses to discovery requests of the Defendant.

Respectfully submitted,

BRYAN, NELSON, ALLEN,
SCHROEDER AND COMPTON

By: /s/ FLOYD G. HEWITT, JR.
FLOYD G. HEWITT, JR.

NETTLES, BARKER & JANECKY

By: /s/ KENNETH O. SIMON
KENNETH O. SIMON

Affidavit in Opposition to Motion for Summary Judgment

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

VS.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

Personally appeared before me, the undersigned authority, Larry Davis, being known to me, and who being by me first duly and legally sworn, under oath doth depose and say as follows:

I am Larry James Davis, and I am the same Larry Davis who has filed Case No. CV-81-002314 against International Longshoremen's Association and I make this affidavit on personal knowledge. Prior to May 18, 1981, I was employed by Ryan-Walsh Stevedoring Company of Mobile, Alabama, as a ship superintendent. On April 12, 1981, I attended a meeting of ship superintendents along with some twelve to fifteen other ship superintendents who worked for various other stevedoring companies in Mobile, Alabama, where Mr. Benny Holland was present and representing Inter-

national Longshoremen's Association. At the meeting of April 12, 1981, Mr. Benny Holland represented himself to me and the other people who were at the meeting as the Secretary/Treasurer of the South Atlantic and Gulf Coast District of the International Longshoremen's Association. The purpose of the meeting with Mr. Benny Holland was to discuss the formation of a union for the ship superintendents who worked at the Port of Mobile, Alabama. At said meeting, Mr. Benny Holland told me and all of the other people present that we could form a union and that if we did form a union, the International Longshoremen's Association would stand behind us. Mr. Holland further stated that if we signed the application for charter and paid the charter fee, and then lost our jobs, the International Longshoremen's Association would get our jobs back for us with back pay.

I believed what Mr. Holland stated to us at the meeting, and I relied on him and believed that he was in the position to know the capabilities of the International Longshoremen's Association and to know the legality of the acts that he was asking us to perform. In reliance upon Mr. Benny Holland and the statements which I have referred to above, I signed the application for charter on April 12, 1981, seeking to become a member of a ship superintendent's union organized under the International Longshoremen's Association. On May 18, 1981, I was fired from my job at Ryan-Walsh Stevedoring Company because I had sought to become a member of a union and ship superintendents are not protected by the National Labor Relations Act. I did not know that it was illegal for me to attempt to unionize and I had no knowledge that I was not protected by the National Labor Relations Act. I relied totally upon Mr. Benny Holland, who assured me that if I lost my job, I would get it back with back pay and that

Affidavit in Opposition to Motion for Summary Judgment

the International Longshoremen's Association would see to it that I did.

/s/ LARRY DAVIS
LARRY DAVIS

SWORN to and subscribed before me on
this the 27th day of July, 1982.

/s/ VICKI BARTWELL SPRINKLE
Notary Public

Of Counsel:

WILKINS, BANKESTER & BILES, P.A.
Attorneys for Plaintiff
Post Office Box 1140
Bay Minette, AL 36507

Plaintiff's Exhibit 1

(Letter dated September 22, 1980 from W.F. Arnett to Stevedoring Interests)

(Letterhead of South Atlantic and Gulf Coast, District, I.L.A.)

From the desk of:

EMILY C. MOSES
Executive Secretary to District President

March 6, 1981

Mr. Trione, this is the information you requested to be sent to you.

/s/ MRS. MOSES

(Letterhead of West Gulf Maritime Association)
Houston, Texas 77002

September 22, 1980

Stevedoring Interests
Employing Walking Foremen under terms of the
Houston-Galveston-Freeport Walking Foreman Agreement

Gentlemen:

The negotiations with the Walking Foremen under their Houston-Galveston-Freeport Agreement have been concluded. The following is a synopsis of terms of settlement.

1. Rule 1. Will be amended to provide for the following guarantee:

   "Walking Foremen ordered for any a.m. starting time (7:00 a.m., 8:00 a.m., 10:00 a.m.) will be paid from 7:00 a.m. If returned for 1:00 p.m., will be be paid until 6:00 p.m. Walking Foremen ordered

Plaintiff's Exhibit 1—Letter dated September 22, 1980 from W.F. Arnett to Stevedoring Interests

for a 1:00 p.m. starting time will be paid from 8:00 a.m. and will be paid until 6:00 p.m. except on election days and pay days." One walking foreman per gang.

2. Rule 5. The straight time wages to be paid to Walking Foremen and the effective date shall be as follows:

Oct. 1, 1980	Oct. 1, 1981	Oct. 1, 1982
$14.20	$15.40	$16.50

In addition to the above wage rates, Walking Foreman to receive same commodity differentials as longshoremen/longshore gang foreman. When securing, Walking Foreman to receive $.10/hr differential *only*. They are not to receive tool differential paid to longshoremen for furnishing their own tools. Walking Foremen will not receive any differential when working cotton. (Note: Wage rates, including differentials, straight time, overtime and double time will be scaled in Rule #5.)

3. Rule 18.

Rule 18 will be amended to provide that two (2) Walking Foremen will be employed on the Weather Deck of a RO-RO ship whenever two cranes are being used in the operation.

4. New Rule

A new rule will be added which will provide that when a multiple number of barges is being worked, the number of barges actually being worked must be within the confines of six hundred (600′) feet. Example: if a string of ten (10) barges is to be worked 1 2 3 4 5 6 7 8 9 10 barges 1 thru 5 or 2 thru

Plaintiff's Exhibit 1—Letter dated September 22, 1980 from W.F. Arnett to Stevedoring Interests

6 or 3 thru 7, etc. can be worked. In other words, the limit of 600′ is a 'floating' 600′. If the 600′ is exceeded a second Walking Foreman must be employed.

5. The Walking Foremen's Committee will be given a 'Memorandum' which will require the Employers to meet with the Walking Foremen at such time as the Court Ordered merger of the local unions takes place. The purpose of this commitment will be to discuss Walking Foremen manning requirements under a one local system.

6. New Rule

"Walking Foremen are required to wear hard hats on all jobs."

7. New Rule

"Walking Foremen are to comply with and make all reasonable efforts to enforce Employer policies designed to achieve compliance with the Occupational Safety and Health Act of 1970, as amended, and other applicable rules and regulations on safety and health."

The Employers will attempt to work out a more compatable Walking Foreman vacation rule for the Port of Freeport.

Very truly yours,

West Gulf Maritime Association

/s/ Wm. F. Arnett
Wm. F. Arnett
President

WFA/bp

Plaintiff's Exhibit 2

(Letter dated April 10, 1981 from J.H. Raspberry to Ben Trione)

(Letterhead of South Atlantic and Gulf Coast District, International Longshoremen's Association, AFL-CIO)

April 10, 1981

Mr. Ben Trione
P. O. Box 121
Montrose, Alabama 36559

Dear Mr. Trione:

Replying to the request with regard to securing a charter for Walking Foremen in the Port of Mobile, I am listing below the steps which must be taken for the issuance of same.

Fill in the charter application enclosed, and have the persons sign their names—do not type in names.

The charter application together with a check made payable to the International in the amount of $100.00 for charter fee and $1.35 per capita tax on each person applying for the charter for 1 month, and a check made payable to the South Atlantic and Gulf Coast District ILA in the amount of 50¢ per capita tax on each person applying for the charter for 1 month.

Forward the charter application, the check for the International and the check for the District to me, and when I receive all of this, I will then poll the District Executive Board for approval or disapproval. If the Board approves the issuance of the charter, I will then request Secretary Treasurer Hasselgren to issue the charter.

Plaintiff's Exhibit 2—Letter dated April 10, 1981 from J.H. Raspberry to Ben Trione

All of these steps must be taken in proper sequence, and I wish to further advise that after the charter is issued; I expect the persons covered under a negotiated agreement to sign the 1% Service Charge Check Off Authorization slips.

Sincerely,

/s/ J. H. Raspberry
J. H. Raspberry, District President

JHR/em
opeiu #27,
afl-cio

Plaintiff's Exhibit 3

(Pledge Card signed by Angelo B. Trione)

PLEDGE CARD

I, the undersigned, employee of Ryan Walsh

....., employed as Stevedore Superintende

hereby authorize International Longshoremen's Association, AFL-CIO, to represent me for the purposes of collective bargaining, respecting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law.

NAME: Angelo B Trione

Home Address: P.O. 121 Montrose, Ala.

Phone: 928-1161 Soc. Sec. No.: 421-76-584

Date: 4-9-81

Angelo B. Trione
Employee's Signature

Local:.....

54

Plaintiff's Exhibit 4

(Application for Charter to International Longshoremen's Association, AFL-CIO)

INTERNATIONAL

Longshoremen's Association

Application for Charter

Dated 4-12 19 81

We, the undersigned, residents of Mobile Ala

believing the INTERNATIONAL LONGSHOREMEN'S ASSOCIATION to be well calculated to improve our social and intellectual position, and to promote our industrial well being and advancement, respectfully petition the

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

to grant us a charter to open a new Local Union, in the City of Mobile

County of Mobile State of Ala and we pledge ourselves, individually and collectively to be governed by the Constitution, Rules and Usages of the INTERNATIONAL LONGSHOREMEN'S ASSOCIATION.

NAME	NAME
Angelo B. Trione	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]

Class of Work Stevedore Superintendent

Charter to be sent to Angelo B Trione Address P.O. Box 1310 Montrose Ala.

Take Notice. — ARTICLE XVI, Section 4. Applications for charters shall be made to the International Secretary-Treasurer, upon such forms and containing such information as the International officers shall prescribe. Such applications must specify the class of work to be performed by said Local and must be signed by at least ten (10) workers of good moral character in a locality where a sufficient number of persons to maintain a Local Union are employed. Applications must be accompanied by a charter fee of [redacted] and one month's per capita tax for each worker.

The International Secretary-Treasurer shall notify any adjoining Local or Locals and the Local District Council of such application before issuing a charter.

156

Plaintiff's Exhibit 5

(Letter dated May 6, 1981 from Benny Holland Jr.)

(Letterhead of South Atlantic and Gulf Coast District, International Longshoremen's Association, AFL-CIO)

May 6, 1981

Mr. Ben Trione
P. O. Box 121
Montrose, Alabama 36559

Dear Ben:

As per your request, enclosed you will find charter application, pledge cards which certain individuals signed authorizing the ILA as their bargaining agent, together with check number 504 in the amount of $118.50, signed by James H. Baker III which was for charter, seal and per capita tax to the District and the International for 1 month.

We are sorry it was not possible for your group to become affiliated with the South Atlantic and Gulf Coast District ILA, and we wish you well in your new endeavor.

Sincerely,

/s/ Benny Holland, Jr.
Benny Holland, Jr., District
Secretary Treasurer

BH/em
opeiu #27,
afl-cio

encl.

cc: District President J. H. Raspberry

Plaintiff's Exhibit 6

(Pledge Card signed by J.W. Johnson)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFFILIATED WITH THE A.F.L.-C.I.O.

TO WHOM IT MAY CONCERN:

I hereby designate the International Longshoremen's Association to represent me for the purpose of collective bargaining and in any and all other situations that may arise under the operation of the National Labor Relations Act, and/or with any individual employer where the provisions of the National Labor Relations Act are not invoked.

I do further repudiate any previous authorization that may have been signed by me.

Witness: _____

Name J W. JOHNSON

Street 17 HEDGEWOOD DR

City or Town SEMMES

State ALA Date 4-12-81

Plaintiff's Exhibit 7

(Pledge Card Signed by Satch Baker)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,

AFFILIATED WITH THE A.F.L.-C.I.O.

TO WHOM IT MAY CONCERN:

I hereby designate the International Longshoremen's Association to represent me for the purpose of collective bargaining and in any and all other situations that may arise under the operation of the National Labor Relations Act, and/or with any individual employer where the provisions of the National Labor Relations Act are not invoked.

I do further repudiate any previous authorization that may have been signed by me.

Witness: _____

Name SATCH BAKER

Street 2865 EASTERWOOD WAY

City or Town ALBANY

State ALBANY Date 4-13-51

Plaintiff's Exhibit 8

(Check signed by J.H. Baker for ILA Charter Application)

JAMES H. BAKER, III
2571 B PATHWAYS
AL D/L 3961292
MOBILE, AL 36606

504

APRIL 12 19 81

61-29
651

PAY TO THE ORDER OF Benny Holland Jr. Sec Treasurer $ 118 50/100

One Hundred Eighteen and 50/100 DOLLARS

The Merchants National Bank
OF MOBILE
MOBILE, ALABAMA 36622

FOR CHARTER James H. Baker III

⑆065100291⑆ 21 630 90⑈ 0504

CLARKE CHECKS

Plaintiff's Exhibit 9

(Pledge Card signed by J.H. Stevens, Jr.)

PLEDGE CARD

I, the undersigned, employee of [illegible], employed as [illegible]

hereby authorize International Longshoremen's Association, AFL-CIO, to represent me for the purposes of collective bargaining, respecting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law.

NAME: [illegible]

Home Address: [illegible]

Phone: [illegible] Soc. Sec. No.: [illegible]

Date: [illegible]

Local: [illegible] 54 [illegible]
Employee's Signature

Plaintiff's Exhibit 10

(Business Card of Benny Holland, Jr.)

(Original illegible)

Plaintiff's Exhibit 11

(Pledge Card signed by Larry Davis)

PLEDGE CARD

I, the undersigned, employee of Ryan-Walsh Stevedoring Stevedore, employed as ....., hereby authorize International Longshoremen's Association, AFL-CIO, to represent me for the purposes of collective bargaining, respecting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law.

NAME: Larry J. Davis

Home Address: 6 Caissen Trace Spanish Ft Ala

Phone: 626-3745 Soc. Sec. No.: 417-60-5040

Date: August 9, 1981

Local: ..... Larry J Davis

54 Employee's Signature

Plaintiff's Exhibit 12

(1980 Income Tax Return of Larry Davis)

General Instructions

Two energy credits make up the residential energy credit, each with its own conditions and limits. These credits are based on: (1) Costs for home energy conservation, and (2) Costs for renewable energy source property.

The credit is based on the cost of items installed in your principal residence after April 19, 1977, and before January 1, 1986. The cost of the items includes the cost of installing them.

Qualified expenditures financed with nontaxable Federal, State, or other grants cannot be used to figure the energy credit.

Purpose.—Use this form to figure your residential energy credit if you had qualified energy saving items installed in your principal residence. The instructions below list conditions you must meet to take the credit. If you have an energy credit carryover from the previous tax year and no energy saving costs this year, fill in only Part III of the form. Attach Form 5695 to your tax return. For more information, please get Publication 903, Energy Credits for Individuals.

What is your principal residence?—To qualify as your principal residence, your residence must meet all of the conditions below.

- It must be the home where you and your family live (you may own it or rent it from another person).
- It must be in the United States.

A summer or vacation home does not qualify.

If you live in a condominium or cooperative housing corporation dwelling unit, it may qualify. Please get Publication 903 for more details.

If you and another person own and use different principal residences and share the cost of qualified energy conservation property or renewable energy source property intended for joint use, each of you may claim the energy credit as a separate taxpayer. Divide the amount of qualified expense among each person on the basis of their share of the contribution to the total cost. This type of expenditure is effective if made after April 1, 1980.

For energy conservation items to qualify, your principal residence must have been substantially completed before April 20, 1977. A dwelling unit is considered substantially completed when it can be used as a personal residence even though minor items remain unfinished.

Note: *You may claim the maximum credit on each principal residence you live in during the tax year. See the instructions for figuring the credit for more than one principal residence.*

What are energy saving items?—You can take the credit for two kinds of energy saving items: energy conservation items and renewable energy source items.

Energy conservation items are limited to:

- insulation (fiberglass, cellulose, etc.) for ceilings, walls, floors, roofs, water heaters, etc.
- storm (or thermal) windows or doors for the outside of your residence.
- caulking or weatherstripping for windows or doors for the outside of your residence.
- a furnace replacement burner that reduces the amount of fuels used.
- a device for modifying flue openings to make a heating system more efficient.
- an electrical or mechanical furnace ignition system that replaces a gas pilot light.
- a thermostat with an automatic setback.
- a meter that shows the cost of energy used.

To take the credit for an energy conservation item, you must:

- install them in your principal residence which was substantially completed before April 20, 1977.
- be the first one to use the item, and
- expect it to last at least 3 years.

The credit for energy conservation items cannot be more than $300.

Renewable energy source items include solar, wind, and geothermal energy items which heat or cool your principal residence or provide hot water or electricity for it.

Examples of solar energy items include:

- collectors,
- rockbeds,
- heat exchangers, and
- solar panels installed on roofs (including those installed as a roof or part of a roof).

An example of an item that uses wind energy is a windmill that produces energy in any form (usually electricity) for your residence.

To take the credit for a renewable energy source item, you must:

- be the first one to use the item, and
- expect it to last at least 3 years.

The credit for renewable energy source items cannot be more than $4,000.

What items are NOT eligible for the energy credit?—You cannot take the credit for items such as the following:

- carpeting;
- drapes;
- wood paneling;
- wood or peat-burning stoves;
- nydrogen fueled residential equipment;
- siding for the outside of your residence;
- heat pump (both air and water);
- fluorescent replacement lighting system;
- replacement boilers and furnaces; and
- swimming pools used to store energy.

Figuring the credit for more than one principal residence.—You can take the maximum credit for each principal residence you live in. If you use all of your credit for one residence and then move, you may take the maximum credit amount on your next residence.

For example, if you sold your principal residence in May of 1980 and bought another in June, you would be entitled to take up to $300 credit on each residence for energy conservation items.

To figure your allowable 1980 energy credit for more than one principal residence, follow these instructions:

(1) Fill out Part I or II on a separate Form 5695 for each principal residence.

(2) Enter the total of all parts on line 15 of one of the forms.

(3) In the space above line 15, write "More than one principal residence."

(4) Attach all forms to your return.

Caution: *You should keep a copy of each Form 5695 that you file for your records. For example, if you sell your principal residence, you will need to know the amount of the credit claimed in prior tax years. You must reduce the basis of your principal residence by the amount of energy credit taken against your tax, if the items for which the credit is taken are a proper increase to the basis.*

What to do with an energy credit when it's more than your tax.—If your credit for this year is more than your tax minus certain other credits, you can carry over the excess energy credit to the following tax year.

Carryover for tax year in which the alternative minimum tax applies.—If the alternative minimum tax applies, you may not receive the full tax benefit for the energy credit claimed during the tax year. If so, the amount of the energy credit benefit you lose is eligible for carryover. See Publication 925, Taxable and Nontaxable Income, for more details.

Specific Instructions

Part I. lines 1a through 1h (insulation, storm (or thermal) windows or doors, caulking or weatherstripping, etc.).—Enter your energy conservation costs only for this tax year. Count the cost of the item and its installation in or on your principal residence. Do not include the cost of repairs or maintenance for energy conservation items.

Part I. line 4.—Enter your total energy conservation costs from 1978 and 1979 for this principal residence. If you had energy conservation costs in the previous tax year but could not take a credit because it was less than $10, enter zero.

Part II. lines 8a through 8d (solar, geothermal, and wind).—Enter your renewable energy source costs only for this tax year. Count the cost of the item and the cost of labor for its assembly, preparation, and installation in connection with your principal residence. Do not include the cost of repairs or maintenance for renewable energy source items.

Part II. line 11.—Enter your total renewable energy source costs from 1978 and 1979 for this principal residence. If you had renewable energy source costs in the previous tax year but could not take a credit because it was less than $10, enter zero.

Part III.—The amount of your energy credit is limited to your tax less other credits. If you have an amount on line 17 which is more than line 20, you can carry over the excess energy credit to the next tax year.

Part III. line 18.—If your tax for the previous tax year was less than the amount of energy credit, you have a credit carryover to this tax year. Enter the carryover amount on this line.

PLAINTIFF'S EXHIBIT 12 11-15-83

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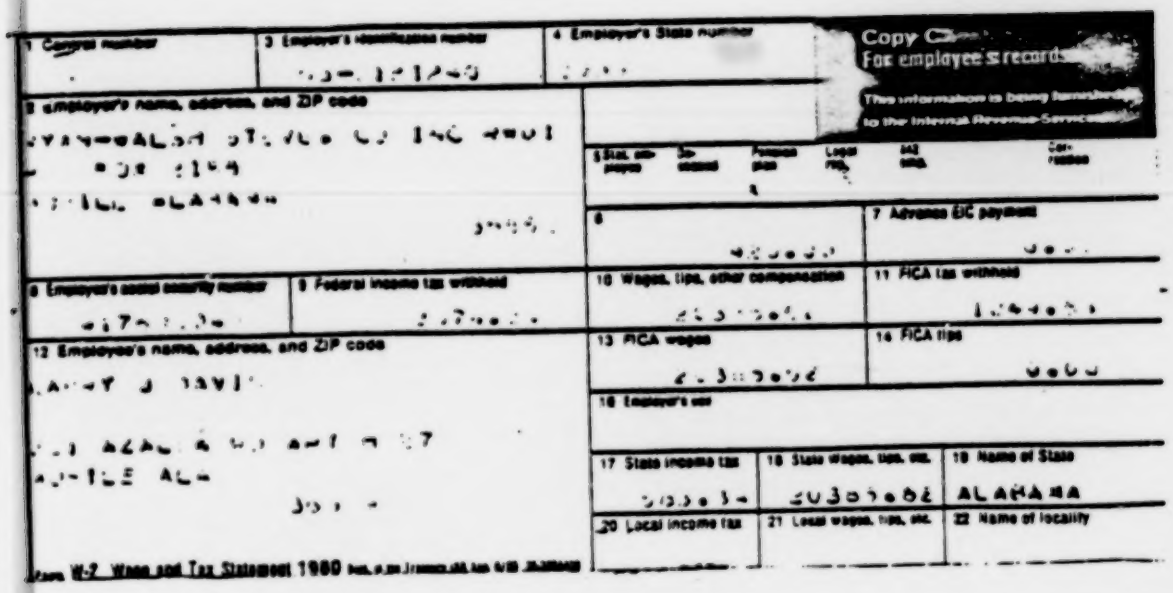

Notice to Employee:

You must file a tax return regardless of your income if any amount is shown in box 7, Advance EIC payment.

File Copy B of this form with your 1980 Federal income tax return. Attach Copy 2 to your 1980 State or local income tax return. Please keep Copy C for your records. You can use it to prove your right to social security benefits. If your name, social security number, or address is incorrect, please correct Copies B, C, and 2 and tell your employer.

If you have nonwage income of more than $500 and net tax of $100 or more, you should file Form 1040-ES, Declaration of Estimated Tax for Individuals, and pay the tax in installments during the year. If you retired during 1980 or plan to retire soon, you may have to pay tax on your income either by filing Form 1040-ES or by having tax withheld from your pension or annuity. See Publication 505, Tax Withholding and Estimated Tax, for details.

Credit for FICA Tax.—If more than one employer paid you wages during 1980 and more than the maximum FICA (social security and hospital insurance) employee tax, railroad retirement (RRTA) tax or combined FICA and RRTA tax was withheld, you can claim the excess as a credit against your Federal income tax. (Please see your Federal income tax return instructions.) The social security (FICA) rate of 6.13%, under Public Law 95-216, includes 1.05% for hospital insurance benefits and 5.08% for old-age, survivors, and disability insurance.

C

Box 5. Pension plan.—If you were covered by a government employee plan, a qualified pension or profit sharing retirement plan, or a tax sheltered annuity plan, the Pension plan box will be marked. Otherwise no mark will be made in this box. Armed Forces reservists, National Guard members, or volunteer firefighters, who have a retirement savings arrangement, should see Publication 590, Tax Information on Individual Retirement Arrangements.

Statement for Recipients of **1980**

Nonemployee Compensation

State Copy

J.L. BARRY & COMPANY, INC.
154 STATE STREET
MOBILE, AL 36602
63-0786217 101763

Type or print PAYER'S name, address, ZIP code, and Federal identifying number

Recipient's identifying number	1 Fees, commissions, and other compensation
417-60-5040	50.00

Type or print RECIPIENT'S name, address, and ZIP code below (Name must come first)

Larry Davis
6 Crimson Trace
Spanish Fort, Alabama 36527

Form 1040 — Department of the Treasury—Internal Revenue Service — U.S. Individual Income Tax Return 1980

For Privacy Act Notice, see Instructions. | For the year January 1–December 31, 1980, or other tax year beginning . 1980, ending 19

Use IRS label. Otherwise, please print or type.

Your first name and initial (if joint return, also give spouse's name and initial) | Last name | Your social security number

Present home address (Number and street, including apartment number, or rural route) | Spouse's social security no.

City, town or post office, State and ZIP code | Your occupation ▶ | Spouse's occupation ▶

Presidential Election Campaign Fund

Do you want $1 to go to this fund? . . . . . ☐ Yes ☐ No

If joint return, does your spouse want $1 to go to this fund? . . . ☐ Yes ☐ No

Note: Checking "Yes" will not increase your tax or reduce your refund.

Requested by Census Bureau for Revenue Sharing

A Where do you live (actual location of residence)? (See page 2 of instructions.) State: City, village, borough, etc. | B Do you live within the legal limits of a city, village, etc.? ☐ Yes ☐ No | C In what county do you live? | D In what township do you live?

Filing Status — Check only one box.

For IRS use only ☐

1 ☐ Single

2 ☐ Married filing joint return (even if only one had income)

3 ☐ Married filing separate return. Enter spouse's social security no. above and full name here ▶ .....

4 ☐ Head of household. (See page 6 of instructions.) If qualifying person is your unmarried child, enter child's name ▶ .....

5 ☐ Qualifying widow(er) with dependent child (Year spouse died ▶ 19). (See page 6 of instructions.)

Exemptions — Always check the box labeled Yourself. Check other boxes if they apply.

6a ☐ Yourself ☐ 65 or over ☐ Blind } Enter number of boxes checked on 6a and b ▶

b ☐ Spouse ☐ 65 or over ☐ Blind

c First names of your dependent children who lived with you ▶ ..... } Enter number of children listed on 6c ▶ 1

d Other dependents: (1) Name	(2) Relationship	(3) Number of months lived in your home	(4) Did dependent have income of $1,000 or more?	(5) Did you provide more than one-half of dependent's support?

Enter number of other dependents ▶ | Add numbers entered in boxes above ▶ 1

7 Total number of exemptions claimed 1

Income — Please attach Copy B of your Forms W-2 here. If you do not have a W-2, see page 5 of Instructions.

8	Wages, salaries, tips, etc.	8	20,792 00
9	Interest income (attach Schedule B if over $400)	9	214 67
10a	Dividends (attach Schedule B if over $400) . . . . . 10b Exclusion		
c	Subtract line 10b from line 10a	10c	
11	Refunds of State and local income taxes (do not enter an amount unless you deducted those taxes in an earlier year—see page 9 of Instructions)	11	
12	Alimony received	12	
13	Business income or (loss) (attach Schedule C)	13	
14	Capital gain or (loss) (attach Schedule D)	14	
15	40% of capital gain distributions not reported on line 14 (See page 9 of Instructions) .	15	
16	Supplemental gains or (losses) (attach Form 4797)	16	
17	Fully taxable pensions and annuities not reported on line 18	17	
18	Pensions, annuities, rents, royalties, partnerships, etc. (attach Schedule E)	18	
19	Farm income or (loss) (attach Schedule F)	19	
20a	Unemployment compensation (insurance). Total received		
b	Taxable amount, if any, from worksheet on page 10 of Instructions	20b	
21	Other income (state nature and source—see page 10 of Instructions) ▶	21	
22	Total income. Add amounts in column for lines 8 through 21 . . . . . ▶	22	21069 67

Please attach check or money order here.

Adjustments to Income — (See Instructions on page 10)

23	Moving expense (attach Form 3903 or 3903F)	23		
24	Employee business expenses (attach Form 2106) . .	24		
25	Payments to an IRA (enter code from page 10 .....) .	25		
26	Payments to a Keogh (H.R. 10) retirement plan . . .	26		
27	Interest penalty on early withdrawal of savings . . .	27		
28	Alimony paid	28		
29	Disability income exclusion (attach Form 2440) . . .	29		
30	Total adjustments. Add lines 23 through 29 . . . . . ▶		30	

Adjusted Gross Income

31	Adjusted gross income. Subtract line 30 from line 22. If this line is less than $10,000, see "Earned Income Credit" (line 57) on pages 13 and 14 of Instructions. If you want IRS to figure your tax, see page 3 of Instructions . . . . ▶	31	21069 67

Form 1040 (1980)

Form 1040 (1980) Page 2

Tax Computation (See instructions on page 11)	32	Amount from line 31 (adjusted gross income)			32	21069 62
	33	If you do not itemize deductions, enter zero If you itemize, complete Schedule A (Form 1040) and enter the amount from Schedule A, line 41 Caution: If you have unearned income and can be claimed as a dependent on your parent's return, check here ▶ ☐ and see page 11 of the instructions. Also see page 11 of the instructions if: • You are married filing a separate return and your spouse itemizes deductions, OR • You file Form 4563, OR • You are a dual-status alien.			33	20 00
	34	Subtract line 33 from line 32. Use the amount on line 34 to find your tax from the Tax Tables, or to figure your tax on Schedule TC, Part I Use Schedule TC, Part I, and the Tax Rate Schedules ONLY if: • Line 34 is more than $20,000 ($40,000 if you checked Filing Status Box 2 or 5), OR • You have more exemptions than are shown in the Tax Table for your filing status, OR • You use Schedule G or Form 4726 to figure your tax. Otherwise, you MUST use the Tax Tables to find your tax.			34	21049 19
	35	Tax. Enter tax here and check if from ☑ Tax Tables or ☐ Schedule TC			35	
	36	Additional taxes. (See page 12 of instructions.) Enter here and check if from ☐ Form 4970, ☐ Form 5072, ☐ Form 5544, ☐ Form 5405, or ☐ Section 72(m)(5) penalty tax			36	
	37	Total. Add lines 35 and 36 ▶			37	220
Credits (See instructions on page 12)	38	Credit for contributions to candidates for public office	38			
	39	Credit for the elderly (attach Schedules R&RP)	39			
	40	Credit for child and dependent care expenses (attach Form 2441)	40			
	41	Investment credit (attach Form 3468)	41			
	42	Foreign tax credit (attach Form 1116)	42			
	43	Work incentive (WIN) credit (attach Form 4874)	43			
	44	Jobs credit (attach Form 5884)	44			
	45	Residential energy credits (attach Form 5695)	45	27		
	46	Total credits. Add lines 38 through 45			46	27 00
	47	Balance. Subtract line 46 from line 37 and enter difference (but not less than zero) ▶			47	2193 00
Other Taxes (Including Advance EIC Payments)	48	Self-employment tax (attach Schedule SE)			48	
	49a	Minimum tax. Attach Form 4625 and check here ▶ ☐			49a	
	49b	Alternative minimum tax. Attach Form 6251 and check here ▶ ☐			49b	
	50	Tax from recomputing prior-year investment credit (attach Form 4255)			50	
	51a	Social security (FICA) tax on tip income not reported to employer (attach Form 4137)			51a	
	51b	Uncollected employee FICA and RRTA tax on tips (from Form W-2)			51b	
	52	Tax on an IRA (attach Form 5329)			52	
	53	Advance earned income credit (EIC) payments received (from Form W-2)			53	
	54	Balance. Add lines 47 through 53 ▶			54	
Payments Attach Forms W-2, W-2G, and W-2P to front.	55	Total Federal income tax withheld	55	3074	54	
	56	1980 estimated tax payments and amount applied from 1979 return	56			
	57	Earned income credit. If line 32 is under $10,000, see pages 13 and 14 of Instructions	57			
	58	Amount paid with Form 4868	58			
	59	Excess FICA and RRTA tax withheld (two or more employers)	59			
	60	Credit for Federal tax on special fuels and oils (attach Form 4136 or 4136-T)	60			
	61	Regulated Investment Company credit (attach Form 2439)	61			
	62	Total. Add lines 55 through 61 ▶			62	3074 54
Refund or Balance Due	63	If line 62 is larger than line 54, enter amount OVERPAID ▶			63	981 54
	64	Amount of line 63 to be REFUNDED TO YOU ▶			64	
	65	Amount of line 63 to be applied to your 1981 estimated tax ▶	65			
	66	If line 54 is larger than line 62, enter BALANCE DUE. Attach check or money order for full amount payable to "Internal Revenue Service." Write your social security number on check or money order ▶ (Check ▶ ☐ if Form 2210 (2210F) is attached. See page 15 of Instructions.) ▶ $			66	

Please Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature ▶ Date ▶ Spouse's signature (if filing jointly, BOTH must sign even if only one had income)

Paid Preparer's Use Only

Preparer's signature and date ▶ Check if self-employed ▶ ☐ Preparer's social security no.

Firm's name (or yours, if self-employed) and address ▶ E.I. No. ▶ ZIP code ▶

Schedules A&B—Itemized Deductions AND Interest and Dividend Income

(Form 1040) — 1980

Department of the Treasury
Internal Revenue Service

▶ Attach to Form 1040. ▶ See instructions for Schedules A and B (Form 1040). — 08

Name(s) as shown on Form 1040 | Your social security number

Schedule A—Itemized Deductions (Schedule B is on back)

Medical and Dental Expenses (not paid or reimbursed by insurance or otherwise) (See page 16 of Instructions.)

1 One-half (but not more than $180) of insurance premiums you paid for medical care. (Be sure to include in line 10 below.) ▶		1
2 Medicine and drugs		
3 Enter 1% of Form 1040, line 31		
4 Subtract line 3 from line 2. If line 3 is more than line 2, enter zero		
5 Balance of insurance premiums for medical care not entered on line 1		
6 Other medical and dental expenses:		
a Doctors, dentists, nurses, etc.	668	52
b Hospitals	498	100
c Other (itemize—include hearing aids, dentures, eyeglasses, transportation, etc.) ▶	155	80
7 Total (add lines 4 through 6c)	823	00
8 Enter 3% of Form 1040, line 31	632	09
9 Subtract line 8 from line 7. If line 8 is more than line 7, enter zero		
10 Total medical and dental expenses (add lines 1 and 9). Enter here and on line 33 ▶	190	91

Taxes (See page 17 of Instructions.)
Note: Gasoline taxes are no longer deductible.

11 State and local income		
12 Real estate		
13 General sales (see sales tax tables)		
14 Personal property	72	50
15 Other (itemize) ▶		
16 Total taxes (add lines 11 through 15). Enter here and on line 34 ▶	1	12

Interest Expense (See page 17 of Instructions.)

17 Home mortgage	2210	32
18 Credit and charge cards		
19 Other (itemize) ▶		
20 Total interest expense (add lines 17 through 19). Enter here and on line 35 ▶		

Contributions (See page 17 of Instructions.)

21 a Cash contributions for which you have receipts or cancelled checks		
b Other cash contributions (show to whom you gave and how much you gave) ▶		
22 Other than cash (see page 17 of instructions for required statement)		
23 Carryover from prior years		
24 Total contributions (add lines 21 through 23). Enter here and on line 36 ▶		

Casualty or Theft Loss(es) (See page 18 of Instructions.)

25 Loss before insurance reimbursement		
26 Insurance reimbursement		
27 Subtract line 26 from line 25. If line 26 is more than line 25, enter zero		
28 Enter $100 or amount from line 27, whichever is smaller		
29 Total casualty or theft loss(es) (subtract line 28 from line 27). Enter here and on line 37 ▶		

Miscellaneous Deductions (See page 18 of Instructions.)

30 Union dues		
31 Other (itemize) ▶		
32 Total miscellaneous deductions (add lines 30 and 31). Enter here and on line 38 ▶		

Summary of Itemized Deductions (See page 19 of Instructions.) — A

33 Total medical and dental—from line 10	192	91
34 Total taxes—from line 16	511	12
35 Total interest—from line 20	2210	32
36 Total contributions—from line 24		
37 Total casualty or theft loss(es)—from line 29		
38 Total miscellaneous—from line 32		
39 Add lines 33 through 38	2620	49
40 If you checked Form 1040, Filing Status box: 2 or 5, enter $3,400; 1 or 4, enter $2,300; 3, enter $1,700		
41 Subtract line 40 from line 39. Enter here and on Form 1040, line 33. (If line 40 is more than line 39, see the instructions for line 41 on page 19.) ▶	20	49

Schedules A&B (Form 1040) 1980 — **Schedule B—Interest and Dividend Income** — Page 2

Name(s) as shown on Form 1040 (Do not enter name and social security number if shown on other side) | Your social security number

Part I Interest Income

1 If you received more than $400 in interest, complete Part I and Part III. Please see page 8 of the instructions to find out what interest to report. Then answer the questions in Part III, below. If you received interest as a nominee for another, or you received or paid accrued interest on securities transferred between interest payment dates, please see page 19 of the instructions.

Name of payer	Amount

2 Total interest income. Enter here and on Form 1040, line 9 . . . . . .

Part II Dividend Income

3 If you received more than $400 in gross dividends (including capital gain distributions) and other distributions on stock, complete Part II and Part III. Please see page 9 of the instructions. Write (H), (W), or (J), for stock held by husband, wife, or jointly. Then answer the questions in Part III, below. If you received dividends as a nominee for another, please see page 19 of the instructions.

Name of payer	Amount

4 Total of line 3 . . . . . .

5 Capital gain distributions. Enter here and on line 13, Schedule D. See Note below . . .

6 Nontaxable distributions . . . . . .

7 Total (add lines 5 and 6) . . . . . .

8 Dividends before exclusion (subtract line 7 from line 4). Enter here and on Form 1040, line 10a . . . . . .

B

Note: *If you received capital gain distributions for the year and you do not need Schedule D to report any other gains or losses, do not file that schedule. Instead, enter 40% of your capital gain distributions on Form 1040, line 15.*

Part III Foreign Accounts and Foreign Trusts

If you are required to list interest in Part I or dividends in Part II, OR if you had a foreign account or were a grantor of or a transferor to a foreign trust, you must answer both questions in Part III. Please see page 19 of the instructions.

	Yes	No
A At any time during the tax year, did you have an interest in or a signature or other authority over a bank account, securities account, or other financial account in a foreign country (see page 19 of instructions)?		
B Were you the grantor of, or transferor to, a foreign trust which existed during the current tax year, whether or not you have any beneficial interest in it? If "Yes," you may have to file Forms 3520, 3520-A, or 926.		

Form **5695**
Department of the Treasury
Internal Revenue Service

Energy Credits

▶ Attach to Form 1040. ▶ See instructions on back.

1980
34

Name(s) as shown on Form 1040 | Your social security number

Enter in the space below the address of your principal residence on which the credit is claimed if it is different from the address shown on Form 1040.

Part I **Fill in your energy conservation costs (but do not include repair or maintenance costs).**
If you have an energy credit carryover from a previous tax year and no energy savings costs this year, skip to Part III, line 16.

A. Answer the following question: Was your principal residence substantially completed before April 20, 1977? . . . ☑ Yes ☐ No
B. If you checked the "NO" box, you CANNOT claim an energy credit for conservation cost. Do NOT fill in lines 1 through 7 of this form.

1	**Energy Conservation Items:**		
	a Insulation	1a	520 00
	b Storm (or thermal) windows or doors	1b	
	c Caulking or weatherstripping	1c	
	d A furnace replacement burner that reduces the amount of fuel used	1d	
	e A device for modifying flue openings to make a heating system more efficient	1e	
	f An electrical or mechanical furnace ignition system that replaces a gas pilot light	1f	
	g A thermostat with an automatic setback	1g	
	h A meter that shows the cost of energy used	1h	
2	Total (add lines 1a through 1h)	2	520 00
3	Maximum amount	3	$2,000 00
4	Enter the total energy conservation costs for this residence from your 1978 and 1979 Form 5695, line 2	4	[illegible]
5	Subtract line 4 from line 3 (If line 4 is more than line 3, do not complete any more of this part. You cannot claim any more energy conservation credit for this residence.)	5	[illegible]
6	Enter the amount on line 2 or line 5, whichever is less	6	520 00
7	Enter 15% of line 6 here and include in amount on line 15 below	7	78 00

Part II **Fill in your renewable energy source costs (but do not include repair or maintenance costs).**
If you have an energy credit carryover from a previous tax year and no energy savings costs this year, skip to Part III, line 16.

8	**Renewable Energy Source Items:**		
	a Solar	8a	
	b Geothermal	8b	
	c Wind	8c	
9	Total (add lines 8a through 8c)	9	
10	Maximum amount	10	$10,000 00
11	Enter the total renewable energy source costs for this residence from your 1978 Form 5695, line 5 and 1979 Form 5695, line 9	11	
12	Subtract line 11 from line 10 (If line 11 is more than line 10, do not complete any more of this part. You cannot claim any more renewable energy source cost credit for this residence.)	12	
13	Enter amount on line 9 or line 12, whichever is less	13	
14	Enter 40% of line 13 here and include in amount on line 15 below	14	

Part III **Fill in this part to figure the limitation**

15	Add line 7 and line 14. If less than $10, enter zero	15	78 00
16	Enter your energy credit carryover from a previous tax year	16	0
17	Add lines 15 and 16	17	78 00
18	Enter the amount of tax shown on Form 1040, line 37	18	2278 00
19	Add lines 38 through 44 from Form 1040 and enter the total	19	78 00
20	Subtract line 19 from line 18. If zero or less, enter zero	20	2162 00
21	Residential energy credit. Enter the amount on line 17 or line 20, whichever is less. Also, enter this amount on Form 1040, line 45	21	78 00

Form 5695 (1980)

Plaintiff's Exhibit 13

(1981 Statement of Unemployment Compensation; 1981 W-2 Wage and Tax Statements for Larry Davis)

(Original illegible)

PAID BY

STATE OF ALABAMA
DEPARTMENT OF INDUSTRIAL RELATIONS
UNEMPLOYMENT COMPENSATION AGENCY
649 MONROE STREET
MONTGOMERY, AL 36130

63—0674968

Statement for Recipients of
Unemployment Compensation
Payments
Copy B—For Recipient

FOR CALENDAR YEAR 19 1

Form 1099-UC

PLAINTIFF'S EXHIBIT 13 11-15-83

PAID TO

This information is being furnished to the IRS and appropriate State officials.

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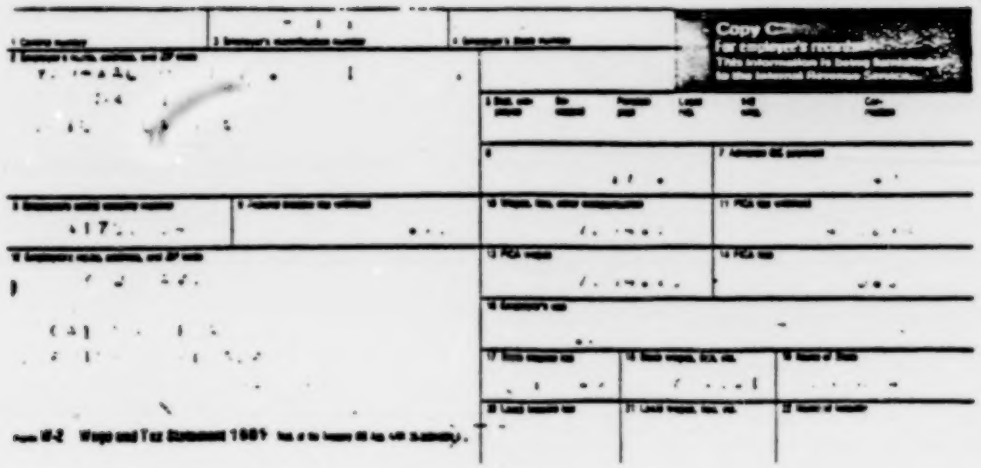

(Original illegible)

1 Control number	2222		
2 Employer's name, address, and ZIP code		3 Employer's identification number	4 Employer's State number
		5 Stat. em- ployee / Cor- rections / Pension plan / Legal rep. / 942 emp. / Sub- total / Cor- rection / Void	
		6*	7 Advance EIC payment
8 Employee's social security number	9 Federal income tax withheld	10 Wages, tips, other compensation	11 FICA tax withheld
12 Employee's name (first, middle, last)		13 FICA wages 1,6[illegible]	14 FICA tips
		16 Employer's use	
		17 State income tax	18 State wages, tips, etc. / 7 [illegible]	19 Name of State
		20 Local income tax	21 Local wages, tips, etc.	22 Name of locality
15 Employee's address and ZIP code			

Form W-2 Wage and Tax Statement 1981 — Copy C For employee's records. This information is being furnished to the Internal Revenue Service — Department of the Treasury Internal Revenue Service

23-2931-16

Defendant's Motion for a Directed Verdict at the Close of Plaintiff's Case

[R163] * * *

(Jury not present:)

The Court: Do you want to be heard before I rule?

Mr. Hewitt: Yes, sir. For the record, sir.

In support of the motion for a directed verdict, Judge, that I presented to you, I would simply like to say that I don't think at this point in time that the plaintiff has presented sufficient evidence to go forward. The evidence, as it stands right now, if there is an independent witness in this case, it's Mr. Lige Boykin, the employer's representative, the individual who fired Mr. Davis, and on Direct testimony, Direct—in respect to Direct questions from the plaintiff's attorney—keeping in mind he was subpoenaed here by the plaintiff's attorney to testify on their behalf —he testified that he fired Mr. Davis on the night in question for his attempt to unionize the Master Mates & Pilots union and for that reason alone, and [R164] that he had never seen that letter of May the 15th, didn't have it with him at the time. Judge, I think that that independent witness' testimony, standing alone, is enough to take the case away from the jury because with the allegations as it stands right now, not with Mr. Trione's case but with regard to Mr. Davis' case, he is saying that on the night in question the only association, only representation he had was that particular meeting of April 12th. Representations were that if he joined the union, signed the pledge cards with the ILA and the charter application, if anyone were to be fired or laid off as a result of signing the pledge cards with the ILA, they would get their jobs back with back pay. Taking those at face value, as you must, in a case like this at this point in time in the trial. That's not the way it came out at all, Judge. The independent witness

simply said I fired him for attempting to unionize the Master Mates & Pilots. That didn't—that letter at all—have anything to do with the ILA. I think, Judge, that that's sufficient evidence to take it away from the jury at this time.

Mr. Janecky: Judge, I would also like to add that I think that as a matter of law the events that had occurred previously that in Mr. Trione's case, if we were trying Mr. Trione's case that would be one thing. But in Mr. Davis' case, he had Mr. Trione as a forebearer. Mr. Trione was fired, he had been subject to a TRO, he had gone to court, there had been an order saying that he was not entitled to, he had crossed the picket line in response to his boss' order and he was okay at that point. In spite of that, he went ahead and tried to set up a meeting for the Master Mates & Pilots, and it is for that reason that he was fired, with the knowledge that he had regarding the status of supervisors at that point in time. I think it's a matter of law he is not entitled to go forward on a fraud as to whatever representations were made at that meeting.

The Court: Well, I don't—Ya'll didn't hear all the evidence I did, or you didn't hear it the way I did. My [R165] understanding of the evidence up to this point is that these people went to the meeting that was arranged between Mr. Trione and Mr. Holland; that at that meeting Mr. Holland represented to them that if they would sign the cards he had there and the charter application and thereby become members of his union that they would be members, that they would be entitled to the protection of the union; that, if, as a result of the union activity, they lost their jobs with there company, their employers, that the union would protect them to the fullest extent, and he didn't say, "We will just protect you," he said, "We will get your job back and we will get back pay." Now, admittedly, there is some discrepancy in the testimony, and that's easily understandable and I'm not the jury. I rule on these kind of things by what evidence is there, not by whether I believe it or whether the jury will believe it or not. That they signed the things, did it relying on Mr. Holland's representations there that, first of all, they were legally eligible to become members of the union; that if they suffered any adverse reaction from their employees as a result of joining that union, that the union would protect them to the extent—and you remember that one or two of them even testified that they said, "We will not only represent you in court, but we will close the whole damn coast from Texas to Florida down if it's necessary to protect your jobs."

Mr. Janecky: If—

The Court: Then—Now, let me finish. Then, when the court put the restraining order on them, that the instructions to go to the Master Mates & Pilots came from Mr. Holland through Mr. Trione; and that that was when they attempted—they never actually had a meeting with the Master Mates & Pilots; that he set up a place for a meeting, that the ship's captains, some of them, were there; that they waited some period of time, twenty or thirty minutes and nobody showed from the Master Mates & Pilots. Now, assuming that the jury buys that and belives that evidence, [R166] then, I don't see why they couldn't find a verdict for the plaintiff and against the defendant.

Mr. Janecky: Because the only evidence—

The Court: Now, I'm going to deny the thing. I let you be heard before I did but—

Mr. Janecky: Yes, sir. Appreciate the Court's indulgence. We have a couple more jury charges we would like to add, Judge, to the ones that we previously submitted. There is just two of them and I think they are correct statements of the law.

Defendant's Motion for a Directed Verdict at the Close of Plaintiff's Case

The Court: Do ya'll need any time before you go ahead with your case?

Mr. Hewitt: No, sir.

The Court: If you don't, we will get the jury back out and go ahead.

Bring them on in.

(Jury present:)

The Court: All right. You may go ahead.

* * * * *

Defendant's Exhibit A

(Temporary Restraining Order)

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Civil Action No. CV 81-500-122

RYAN-WALSH STEVEDORING COMPANY, INC.,
a corporation,

Plaintiff,

v.

BEN TRIONE,

Defendant.

TEMPORARY RESTRAINING ORDER

This matter coming on to be heard on the 21st day of April, 1981, on the verified complaint of the Plaintiff, on the affidavits submitted by the Plaintiff and upon the Plaintiff's application for a temporary restraining order against the Defendant, and it appearing to the Court that the Defendant is engaged in picketing of the Plaintiff's business which constitutes unlawful interference with the Plaintiff's operation of its business and unlawful interference with the contract of the Plaintiff with persons other than the Defendant; that Defendant's actions are continuing in nature and, unless restrained, are causing and still continue to cause substantial and irreparable injury to the Plaintiff for which the Plaintiff has no adequate remedy at law; that Plaintiff will suffer greater injury from the denial of a temporary restraining order than will the Defendant from its issuance; and it further appearing to the Court that

immediate, substantial and irreparable injury would result to the Plaintiff before notice could be served on the Defendant and a hearing had on the application of Plaintiff for a temporary restraining order.

Now, THEREFORE, it is ORDERED that Defendant, and all persons acting in concert or participation with him are restrained and enjoined from:

1. In any manner interfering with or obstructing by words or actions, any person or persons working for or having contracts with the Plaintiff;

2. Interfering with the operations of the Plaintiff in any manner whatsoever;

3. Interfering with contractual relations existing between the Plaintiff and others;

4. Picketing at any place in such a manner calculated to induce or having the effect of inducing any persons or parties not to enter into contracts with the Plaintiff or not to honor or comply with any of the terms of any existing contracts with the Plaintiff.

On condition that a bond be filed by the Plaintiff herein in the amount of $5,000.00 for the payment of such costs and damages as may be suffered by any party who is found to have been wrongfully enjoined or restrained, said bond to be approved by this Court or the Clerk of the Court.

It is further ORDERED that this temporary restraining order shall remain in full force and effect until 9:30 a.m. on the 28th day of April, 1981.

It is further ORDERED that the Defendant appear before this Court at Room 7 of the Mobile County Courthouse, Mobile, Alabama, on the 28th day of April, 1981, at 9:30 a.m. and then and there show cause why a preliminary injunction should not issue restraining the Defendant and

any and all persons acting in concert with any of them, as set forth herein.

It is further ORDERED that a copy of this order together with a copy of the Complaint and all exhibits and affidavits upon which it is issued, be immediately served upon the Defendant in any manner provided by the Alabama Rules of Civil Procedure.

This Order issued at 12:30 p.m. o'clock this 21st day of April, 1981.

/s/ (Illegible)
Circuit Judge

"A TRUE COPY"

/s/ (Illegible)
Register, Circuit Court of
Mobile County, Alabama

Defendant's Exhibit B

(Preliminary Injunction)

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Civil Action No. CV 81-500-122

RYAN-WALSH STEVEDORING COMPANY, INC.,
a corporation,

Plaintiff,

v.

BEN TRIONE,

Defendant.

PRELIMINARY INJUNCTION

This matter came on to be heard on the 28th day of April, 1981, on the plaintiff's motion for a preliminary injunction. Having considered the plaintiff's verified complaint and the affidavits submitted in support thereof, the testimony offered by the parties, and the defendant's answer and being fully advised in the premises, the Court makes the following findings of fact conclusions of law.

FINDINGS OF FACT

1. Plaintiff Ryan-Walsh Stevedoring Company, Inc., (hereinafter "Ryan-Walsh") is an Alabama corporation engaged in the business of furnishing stevedoring services for the loading and unloading of vessels calling at the Port of Mobile.

2. Defendant Ben Trione is an individual over the age of nineteen years.

3. In furtherance of its business, Ryan-Walsh, for valid consideration, enters into contracts with various persons, firms, and corporations under which Ryan-Walsh agrees to provide stevedoring services for the loading and unloading of vessels in the Port of Mobile. Pursuant to those contracts, Ryan-Walsh employs longshoremen who, under the supervision of Ryan-Walsh, perform the work of loading and unloading vessels. Ryan-Walsh also employs certain maintenance and garage workers, including gearmen, garagemen, equipment operators, mechanics, and helpers, whose work is essential to the performance of Ryan-Walsh's business of loading and unloading vessels at the Port of Mobile.

4. Ryan-Walsh's longshoremen are represented for the purpose of collective bargaining by Local 1410 of the International Longshoremen's Association. Maintenance and garage workers are represented for the purpose of collective bargaining by Local 1985 of the same Union. Both Unions have entered into collective bargaining agreements with plaintiff through its collective bargaining representative, the Mobile Steamship Association, Inc., which agreements prohibit strikes during the lives of the agreements.

5. Ryan-Walsh also employs a number of persons, known as "ship superintendents" whose responsibility it is to oversee and direct the work of its employees at various work sites in the Port of Mobile. Each of these ship superintendents has authority, in the interest of Ryan-Walsh, to hire, transfer, suspend, discharge, assign, reward and discipline other employees, or has responsibility to direct them and to adjust their grievances, or to effectively recommend such action, all based on their independent judgment. Prior to the termination of his employment, defendant was employed as a ship superintendent by Ryan-Walsh and was possessed with the aforesaid authority.

Defendant's Exhibit B—Preliminary Injunction

6. Defendant, in concert with certain other persons, has engaged in a campaign to organize plaintiff's ship superintendents for purposes of collective bargaining. His employment was subsequently terminated.

7. Beginning on April 21, 1981, Defendant began picketing at the entrance to certain areas at which Ryan-Walsh conducts its lawful business activities. Defendant was engaged in said picketing for the purpose of inducing Ryan-Walsh's longshore and maintenance employees to refuse to report to work in violation of the no-strike provisions of their collective bargaining agreements. As a result of Defendant's picketing, Ryan-Walsh's employees who are members of Locals 1410 and 1985 refused to report to work and engaged in a sympathy strike in support of Defendant for so long as defendant continued his picketing.

8. The picketing by the Defendant is the result of and is conducted in furtherance of a conspiracy among Defendant and certain other persons to organize plaintiff's ship superintendents for the purpose of collective bargaining and to illegally induce employees of the Plaintiff to refuse to work pursuant to their contracts with Plaintiff and to prevent and/or interfere with the Plaintiff's performance of contracts with its customers to load and unload vessels at the Port of Mobile. Defendant's picketing constituted an interference with the contractual relations existing between Plaintiff and its employees and between Plaintiff and companies with whom Plaintiff does business.

9. The continuation of Defendant's picketing would result in substantial disruption and destruction of plaintiff's business, would irreparably injure or destroy Plaintiff's reputation and good will and would irretrievably impair Plaintiff's ability to enter into profitable arrangements with others.

Defendant's Exhibit B—Preliminary Injunction

CONCLUSIONS OF LAW

1. The Plaintiff's ship superintendents are supervisors within the meaning of section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11). The Defendant's attempt, while employed as a ship superintendent, to organize Plaintiff's ship superintendent for purposes of collective bargaining was not conduct protected by the National Labor Relations Act, either arguably or otherwise.

2. The Defendant's conduct in picketing plaintiff's business operations in furtherance of his efforts to organize the ship superintendents for the purpose of collective bargaining and for the purpose of inducing employees of Ryan-Walsh to refuse to work pursuant to their contracts with Plaintiff constitutes picketing for an unlawful purpose.

3. Defendant's picketing constitutes an unlawful interference with the contractual relations between Plaintiff and its employees and between Plaintiff and companies with whom Plaintiff does business, and further constitutes an unlawful interference with Plaintiff's right to carry on its lawful business.

4. Defendant's conduct is in furtherance of a combination, conspiracy, agreement, arrangement or understanding for the purpose of hindering, delaying or preventing Plaintiff from carrying on its lawful business, which has heretofore been entered into without just cause or legal excuse for doing so in violation of § 13-6-60, *Code of Alabama* (1975).

5. Defendant, by means of duress has prevented, or seeks to prevent, others from doing work for or furnishing materials to or contracting to do work or furnish materials to Plaintiff, who is engaged in a lawful business, and has

disturbed, interfered with, or prevented, or attempted to prevent, the peaceable exercise by Plaintiff of its lawful industries, businesses, or callings, in violation of § 25-7-9, *Code of Alabama* (1975).

6. The Plaintiff has demonstrated a substantial likelihood that it will eventually prevail on the merits.

7. Plaintiff is suffering great and irreparable damage as a result of Defendant's picketing and interference and will suffer further irreparable injury unless the requested preliminary injunction issues.

8. Plaintiff has no adequate remedy at law and unless Defendant is preliminarily enjoined, Plaintiff will continue to suffer irreparable injury which cannot adequately be compensated in money damages.

9. Greater injury would result to the Plaintiff from denial of a preliminary injunction than will be inflicted on plaintiff by granting of such relief.

10. The preliminary injunction requested by the Plaintiff would not be adverse to the public interest but, to the contrary, would further the public policy of this State against the unlawful and unjustified interference with lawful businesses and with the performance of lawful contracts.

NOW, THEREFORE, it is ORDERED that the Defendant, and all persons acting in concert or participation with him, are enjoined pending further order of this Court from:

1. In any manner interfering with or obstructing by words or actions, any person or persons working for or having contracts with the Plaintiff;

2. Interfering with the operations of the Plaintiff in any manner whatsoever;

3. Interfering with contractual relations existing between the Plaintiff and others;

4. Picketing at any place in such a manner calculated to induce or having the effect of inducing any persons or parties not to enter into contracts with the Plaintiff or not to honor or comply with any of the terms of any existing contracts with Plaintiff.

On condition that a bond be filed by the Plaintiff herein in the amount of $5,000.00 for the payment of such costs and damages as may be suffered by any party who is found to have been wrongfully enjoined said bond to be approved by this Court or the Register of the Court.

DONE and ORDERED this the 4th day of May, 1981.

/s/ (Illegible)
Circuit Judge

Defendant's Exhibit C

(Regional Director's Ruling Dismissing Unfair Labor Practice Charge dated May 15, 1981)

NATIONAL LABOR RELATIONS BOARD
REGION 15
Plaza Tower Building, Suite 2700
1001 Howard Avenue, New Orleans, Louisiana 70113
Telephone 504/589-6396

May 15, 1981

RE: Ryan-Walsh Stevedoring Co., Inc.
Mobile, Alabama
Case No. 15-CA-8138

Mr. Gregory B. Stein
Attorney at Law
Post Office Box 1051
Mobile, AL 36633

Dear Mr. Stein:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that further proceedings on the charge are not warranted inasmuch as the evidence disclosed that Mr. Trione was employed as a supervisor within the meaning of Section 2(11) of the Act. For this reason, Section 8(a)(3) would not be applicable to his discharge inasmuch as "supervisors" are specifically excluded from the definition of employee under the Act. Nor is there sufficient evidence to establish that Mr.

Defendant's Exhibit C—Regional Director's Ruling Dismissing Unfair Labor Practice Charge dated May 15, 1981

Trione's discharge violated Section 8(a)(1) of the Act. I am, therefore, refusing to issue a complaint in this matter.

Very truly yours,

JOSEPH G. NORTON
Acting Regional Director

CERTIFIED MAIL

cc: Frank McRight, Attorney
Post Office Box 2906
Mobile, AL 36652

Ryan-Walsh Stevedoring Co., Inc.
150 North Royal
Mobile, AL 36601

Mr. Ben Trione
East Park Plaza
7 Mark Street
Montrose, AL 36559

Defendant's Exhibit C—Regional Director's Ruling Dismissing Unfair Labor Practice Charge dated May 15, 1981

FORM NLRB-4938
(10-75)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PROCEDURE FOR FILING AN APPEAL

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action by filing an appeal with the General Counsel, addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C. 20570, and a copy with the Regional Director. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C. by the close of business on May 28, 1981. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington, and a copy of any such request should be submitted to the Regional Director.

If you file an appeal, please complete the notice forms enclosed with the attached letter and send one copy of the form to each of the other parties whose names and addresses are listed. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Defendant's Exhibit D

(Letter from J.W. Johnson)

International Longshoremans Association
1821-27 The Strand
Galveston, Texas

ATTENTION: Mr. Benny Holland

Gentlemen:

I have reconsidered my intention to become involved in the organizational drive of the International Longshoremans Association; and I am writing to tell you that I do not wish to participate in any way. Accordingly, you are advised by this letter that I am revoking the earlier authorization given to you to represent me for purpose of collective bargaining and a resignation of my membership in your union. Please confirm your receipt of this letter and return all authorizations and other documents which I have submitted.

Very truly yours,

/s/ J. W. JOHNSON

Defendant's Motion for a Directed Verdict at the Close of All the Evidence

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE

Comes now the Defendant in the above styled and numbered cause, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, and moves the Court to direct a verdict in its favor for the following reasons:

1. There is not a scintilla of evidence that the Defendant made a misrepresentation that ship superintendents could legally become members of a union.

2. Misrepresentation of a matter of law, if made, cannot constitute actionable fraud since everyone is presumed to know the law.

3. There is not a scintilla of evidence that the Defendant made any misrepresentation of facts material to this lawsuit.

Defendant's Motion for a Directed Verdict at the Close of All the Evidence

4. There is not a scintilla of evidence that the Defendant made promises of future action or, if made, made with the intention of deceiving the Plaintiffs and with no intention of fulfillment on the Defendant's part.

5. There is not a scintilla of evidence demonstrating that the Plaintiff is entitled to punitive damages in this case.

Respectfully submitted,

NETTLES, BARKER & JANECKY

BRYAN, NELSON, ALLEN,
SCHROEDER & COMPTON
Attorneys for the Defendant

By: /s/ FLOYD G. HEWITT, JR.
FLOYD G. HEWITT, JR.

Filed: 11-15-83 after both sides had rested. T.J.M.
Denied: 11-15-83. T.J.M.

Defendant's Requested Jury Charges

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE No. 1

The Court instructs the jury to find for the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION.

Ref.
T. J. M.

Defendant's Requested Jury Charges

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE No. 3

The Court instructs the jury that to constitute actionable fraud or deceit, there must be a concealment or misrepresentation with regard to a material fact which is then in existence and not with regard to a question of law. The Court further instructs the jury that whether or not an individual who is employed as a ship superintendent may continue to be, or may become, a member of a union is a question of law and not of fact.

Ref.
T. J. M.

Bank of Loretta v. *Bobo*, 67 So.2d 77 (1953)

Spry Funeral Homes, Inc. v. *Denton*, 363 So.2d 786 (1978)

Defendant's Requested Jury Charges

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE NO. 4

The Court instructs the jury that, as a matter of law, any individual employed as a ship superintendent may continue to be, or may become, a member of a labor organization.

Ref.
T. J. M.

§164 of the Labor-Management Act

29 U.S.C. 164

Defendant's Requested Jury Charges

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE NO. 5

The Court instructs the jury that statements of an intention or a promise to do an act in the future are not statements of existing material fact and do not create a cause of action unless it is clearly and satisfactorily shown that such intention or promise to do an act in the future was made without any intention of performing it. The Court further instructs the jury that mere failure to perform is not evidence of intent not to perform at the time the promise was made and even if you find by clear and satisfactory evidence that the Defendant told the Plaintiff, LARRY DAVIS, that it would protect him from actions taken against them by his employer because of his participation in union organization efforts, and that, if fired, he would get the Plaintiff his job back, with back pay, you may not award damages to the Plaintiff unless he has clearly and satisfactorily shown that at the time such promise as to future action was made, and relied upon by the Plaintiff,

it was made with the intention of deceiving the Plaintiff and with no intention of fulfillment by the Defendant.

Ref.
T. J. M.

Sheppard v. *Kendrick*, 181 So. 784 (Ala. 1938)

Nelson Realty Co. v. *Darling Ship of Birmingham*, 101 So. 2d 78 (Ala. 1978)

Walker v. *Woodall*, 262 So.2d 756 (Ala. 1972)

Winn-Dixie Montgomery, Inc. v. *Henderson*, 371 So.2d 899 (Ala. 1979).

§6-5-104(b)(4) Alabama Code of 1975

IN THE
CIRCUIT COURT OF MOBILE COUNTY, ALABAMA
Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE No. 12

The Court instructs the jury that if you are reasonably satisfied from the evidence that the plaintiff, Larry Davis, was fired from his job at Ryan-Walsh because of his union organizing activities for the Masters, Mates and Pilots Union and not because of his attempted affiliation with the International Longshoremen's Association, then your verdict must be in favor of defendant International Longshoremen's Association.

Ref.
T. J. M.

Defendant's Requested Jury Charges

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE No. 13

The Court charges the jury that if you are reasonably satisfied from the evidence that the statements made by Mr. Ben Holland on April 12, 1981, to the plaintiff and the other superintendants were simply his opinions on what the International Longshoremen's Association would attempt to do if one or more of them were fired, then such opinions are not a misrepresentation of material fact and your verdict must be in favor of the defendant.

Ref.
T J. M.

Defendant's Requested Jury Charges

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE No. 15

The Court charges the jury that under the National Labor Relations Act there is no prohibition for any individual employed as a supervisor from becoming or remaining a member of a labor organization.

29 USCA Section 164(a)

Refused
T. J. M.

Defendant's Requested Jury Charges

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE No. 16

The Court charges the jury that it is the law in Alabama that an employee working without a contract of employment is considered an employment at will and can be discharged at any time for any cause.

Refused
T. J. M.

Defendant's Requested Jury Charges

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE No. 17

The Court instructs the jury that in this action the plaintiff seeks to recover damages he claims to have sustained as the result of the alleged fraud of the Defendant in making to the Plaintiff intentional misrepresentations of existing material fact.

The Court further instructs the jury that if you find that the evidence in this case, if any, that:

1. the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, wilfully misrepresented that the Plaintiff, as a ship superintendent, could legally become a member of a union, that the Defendant would protect the Plaintiff from actions taken against him by his employer because of his participation in an attempt to organize a union, and that, if fired, the Defendant would get him his job back, with back pay, and
2. that these misrepresentations were both false and concerned an existing material fact, and
3. the Defendant knew these misrepresentations of fact to be false, and

Defendant's Requested Jury Charges

4. that the Defendant intended to deceive or induce the Plaintiff to act by means of these wilful misrepresentations of fact, and
5. that the Plaintiff was ignorant of the falsity of the Defendant's misrepresentations of fact, and
6. that the Plaintiff reasonably relied, with a right to do so, upon the truth of the Defendant's misrepresentations of fact, and
7. that the Plaintiff was injured as a consequence of his reliance,

then your verdict shall be for the Plaintiff.

However, if you believe that the Plaintiff has failed to prove any one of these elements, then it is your sworn duty to return a verdict for the Defendant.

Old Southern Life Ins. Co. v. *Woodall*, 348 So.2d 1377 (Ala. 1977).

Given
T. J. M.

DEFENDANT'S REQUESTED CHARGE NO. 18

The Court charges the jury that the element of fraud dealing with the reliance of the plaintiff on a misrepresentation requires a reasonable reliance on such misrepresentation. Reasonable reliance is such as a reasonably prudent person would rely under the same or similar circumstances.

Given
T. J. M.

Filed November 16, 1983

Maurice W. Castle, Jr., Clerk

Instructions to the Jury

[R256] * * *

Now, the plaintiff in this case—I want to get down to the law in this particular case. The plaintiff in this case, as I told you Monday, is claiming damages of the defendant for a legal fraud. The gist or the meat of a legal fraud is the assertion or the representation of that to be true which is in fact not true. And there are several different ways that one can be guilty of a legal fraud and, in the course of these instructions, I intend to cover all of the different ways. They involve different degrees of wrong and different kinds of damages, and that's the reason that we have the different types.

The plaintiff in his complaint alleged that the fraud practiced upon him by the defendant was that the defendant's agent, servant, or employee, acting in the line and scope of his employment as such agent, servant or employee represented to the plaintiff and to others in the plaintiff's condition—ship superintendents or ship foremen—that the plaintiff was eligible to join the union—I will say the defendant—the ILA. That's the International Longshoremen's Association, and I will probably just use ILA to keep from having to say all three of those long words. That he represented to them that they were eligible to join that organization; that they would—that the union would, if they joined, would furnish them all of the protection that the union could furnish; and that the union would, if because of their activity in joining the ILA, if they lost their jobs with their employers that the union would get their jobs back and that the union would force the employer to pay the defendants' all back salary that they lost by reason of this firing. Now, [R257] remember, this is what the plaintiff has alleged.

The defendant's answer to that complaint was that they didn't do that. And, when the defendant filed an answer denying guilt, denying that it had done the things complained of by the plaintiff, that put on the plaintiff the burden of reasonably satisfying you, each one of you in-

dividually and the twelve of you as a body, of the truth of all of the material allegations of that complaint in order for the plaintiff to be entitled to a verdict at your hands.

Now, as I told you earlier in these instructions, a misrepresentation can be committed in several different ways. And the very first one is a willful misrepresentation. The defendant has to—you have to be reasonably satisfied from the evidence in order for the plaintiff to be entitled to a verdict that before this suit was filed the defendant acting by and through its agent, Mr. Hammond—I believe is his name?

Mr. Hewitt: Holland.

The Court:—willfully misrepresented a material fact to the plaintiff with the intent to induce the plaintiff to act on that representation; that the plaintiff did, without knowledge of the falsity of the representation, act upon said willful misrepresentation to his injury. Now, those are the elements of that offense, and you can see the difference, of course, of what willful is. Willful is intentional or knowledgeable, it's doing something and being aware at the time that you do it of what you are doing and what the effects of your act might be. Now, these are the elements that the plaintiff is required to prove to your reasonable satisfaction in order for him to be entitled to a verdict at your hands against the defendant, the ILA. First of all, that before the filing of this suit, I believe it was that Sunday night, April the 12th, 1981, that the defendant made a false representation to the plaintiff and to others; that that false representation was concerning an existing material fact; that that representation was made with knowledge or belief [R258] on the part of the defendant that the representation was false; that it was made by the defendant for the purpose of inducing the plaintiff to act, that is to join his union; that the plaintiff relied on that false representation; and that he proximately suffered damages as a result of relying on that representation. Now, that's the very first thing. If you believe that, then, the plaintiff is entitled to a verdict at your hands. And, in that connection, I'm not going to discuss damages with you until I have discussed all of the material aspects of legal fraud and the different ways that one can commit a legal fraud, and I don't want any one of you, when you get back there, to talk about damages until you decide whether the plaintiff has met the burden put on him by law of reasonably satisfying you that he is entitled to a verdict against the defendant. Because, if you are not reasonably satisfied that he is entitled to a verdict, you shouldn't be concerned about damages. And I wouldn't want any one of you—and you shouldn't under your oath—to say, "Well, I'm not convinced that the plaintiff is entitled to a verdict but, if you make the damages low enough, I will go along with one." Decide, first of all, whether the plaintiff is entitled to a verdict then discuss damages, and I will get into the damage aspect of this more fully later in this charge.

The second way that a person or an organization can be guilty of legal fraud is by a reckless misrepresentation. And, if each one of you individually and the twelve of you as a body are reasonably satisfied from all of the evidence in this case that the defendant misrepresented a material fact recklessly without knowledge of the truth or falsity thereof and with the intent to induce the plaintiff to act and the plaintiff acted without knowing that that representation was false and relying on that representation, then, the defendant is guilty of a legal fraud just as though he knew it was wrong and did it. In other words, the law says that if I represent something to you as being true when I don't know whether it's true or not and I by [R259] that representation induce you to act, I made it for the purpose of getting you to act, and you without recognizing or realizing that that representation is false, that that's just as

much legal fraud as though I did it knowing it was wrong and willfully and intentionally committed the wrong. You see the difference? Just as wrong in the eyes of the law to say to a person for the purpose of inducing that person to take an action that something is true when I do not actually know that it's true and it turns out that it's false, by my representation I cause that person to act, he relying on that representation and without knowledge of the falsity acts and suffers harm as a result of the action, he has a right to recover against me just in the same manner as though I had knowingly told him a falsehood.

The third way that a legal fraud can be perpetrated is through a mistaken or an innocent misrepresentation. And if you, as a body, are reasonably satisfied from the evidence that the defendant innocently or by mistake misrepresented a material fact to the plaintiff, thereby inducing the plaintiff to take an action that he would not have taken without that misrepresentation, and relying on that misrepresentation the plaintiff acts and suffers injury thereby, then, the plaintiff is entitled to a verdict for legal fraud right on. But—and I will explain this to you—the difference, there, is in the kind of damages that the jury may consider in awarding the plaintiff if you find that the defendant misrepresented something but did it innocently or by mistake and induced the plaintiff to act at his risk and to his injury.

I don't know if, in reckless misrepresentation, that I went through the elements individually to be sure that you understand them. But, in order for the plaintiff to be entitled to a verdict at your hands against the defendant on reckless misrepresentation of facts to him, you have got to be reasonably satisfied from the evidence, first of all, that there was a reckless misrepresentation. That is one that was made without **[R260]** that ascertainment of the truth of the statement that would be possible and made with reckless disregard to the consequences of whether it was true or not. Second, that the reckless misrepresentation was made concerning an existing material fact. Third, that it was made by the defendant recklessly or without sufficient information therefor. Fourth, that it was made for the purpose of inducing the plaintiff to act. Fifth, that the plaintiff relied upon that and didn't know that it was false and that, as a result of his relying upon that reckless misrepresentation, he acted to his injury.

Mistaken representation and innocent misrepresentation requires the following things in order for the plaintiff to be entitled to a verdict: One, an innocent or mistaken misrepresentation; two, concerning an existing material fact; three, made by a defendant with the intent to induce the plaintiff to act; fourth, reliance by the plaintiff on that misrepresentation thereby inducing him to act and acting on it without knowing that it's false; and, finally, being damaged as a result of his act.

And, finally, you can be guilty of a legal fraud where you are in a position where another person is relying upon what you say and you suppress or fail to reveal to that person a fact that you know and that he doesn't know. And, if you do that, you are guilty of a legal fraud. And, if after considering all of this evidence you are reasonably satisfied from the evidence that the defendant concealed or withheld material facts from the plaintiff and without his knowledge of such material facts—that is the plaintiff's—the plaintiff acted to his injury, then, the defendant would be guilty of a legal fraud.

Now, the very first element—and these are the elements that you must be convinced of to find for the plaintiff and against the defendant because of a suppression of the truth or deceit—first of all, there must have been a duty on the part of Mr. Hammond (sic) at that meeting to disclose facts **[R261]** to the plaintiff and to others, facts which he knew and which they did not know; second, he must have concealed or failed to disclose those material facts to the plaintiff; third, it must have been done to induce the plaintiff

to act; fourth, the plaintiff, relying on the assertions of the defendant and on his failure to disclose those facts, must take action and without knowledge that was concealed from him, and his action must result in damages to himself.

Now, those are the things or one set of those that you must be reasonably satisfied from the evidence that you heard in this case are true in order for you to find a verdict for the plaintiff and against the defendant. Either that before the plaintiff acted that the plaintiff (sic) acting by and through its secretary treasurer, Mr. Hammond, willfully misrepresented a material existing fact to the plaintiff; that he did it with full knowledge that it was false; that he did it for the purpose of inducing the plaintiff to an action, to act; that the plaintiff, relying upon that misrepresentation and without knowledge of the falsity of the misrepresentation, acted and that his action proximately resulted in damages to himself. If you find all of those facts to be true, all those assertions to be true from the evidence in this case, then, the plaintiff would be entitled to a verdict at your hands.

If you do not find that there was a willful misrepresentation of facts but you are reasonably satisfied from all of the evidence that at that meeting on April the 12th, that Sunday night, that the secretary treasurer of the union recklessly misrepresented facts to the plaintiff and to others; that that reckless misrepresentation was as to an existing material fact; third, that it was made by the defendant recklessly or without sufficient information therefor; that it was made for the purpose or with the intention of inducing the plaintiff to act; that the plaintiff did act on that misrepresentation without knowledge that it was false and that his action proximately **[R262]** resulted in damages to himself, then, the plaintiff would be entitled to a verdict at your hands.

If you are not reasonably satisfied from the evidence of the existence of any one of those elements, then, you

couldn't find for the plaintiff on either one of those. But you could consider a innocent or a mistaken representation. And, as I explained to you just now, if you are convinced from the evidence or reasonably satisfied from the evidence that the defendant's agent at that meeting that Sunday night mistakenly or innocently misrepresented a material fact to the plaintiff; that he did it for the purpose of inducing the plaintiff to act; that the mistaken misrepresentation was as to a existing material fact; that the plaintiff relied on that misrepresentation and without knowing that it was wrong, was false, acted and that, as a proximate result of his action he suffered damages, then, the plaintiff would be entitled to a verdict there.

And I just finished going over the elements of deceit: The failure to reveal an existing material fact which was peculiarly—I may not have said that quite right, my tongue gets twisted—peculiarly in the knowledge of the defendant and not within the knowledge of the plaintiff. And, first of all, as I told you, the elements of that offense are a duty on the part of the defendant to disclose the facts to the plaintiff. Did the defendant, acting by and through its secretary treasurer, had he put himself in the position where the plaintiff and others had a right to rely on the things that he told them concerning the activities that they were there about? Did he fail to disclose to them or did he conceal material existing facts which he knew and which they did not know and which he had reason to believe they did not know? Did he do that for the purpose of inducing the plaintiff to act? And did the plaintiff, without that knowledge, act and act to his injury?

Now, I will discuss damages with you. Damages in the law are two types. They are compensatory and punitive. **[R263]** Now, compensatory damages are damages which the law says may be allowed to a wronged or to a injured party to compensate him for all the damages that he suf-

fered as a consequence of the wrongful act. The other type of damages are what we call exemplary or punitive damages. Punitive damages have nothing to do with compensation. Punitive damages are allowed for two reasons. First, to punish a defendant for a wrongful act. Consequently, the more wrongful the act, the more damages the jury may award. Second, they are allowed for the purpose of deterring other people from committing similar acts. To act as a deterrent just as we put people in the penitentiary hoping that it will deter not only them but other people from committing the crimes that those particular people were guilty of.

So, the law says that in these first two types of fraud where there was a willful misrepresentation of a material existing fact knowingly made, made for the purpose of inducing another to act, and the other relying upon that false misrepresentation and without knowledge of it's falsity acts and suffers damages thereby, that the jury may award not only compensatory damages but you may award punitive damages. Compensatory damages are for the purpose of putting one in the position he would have been in if there had been no wrongful act. You consider what damages he proved from the evidence and allow such amount in dollars as you feel would reasonably compensate him. Punitive damages, as I said, are allowed for the purpose of punishing one for a wrongful act and, second, for the purpose of deterring not only that particular defendant but all others in a like situation from committing the same or similar act.

The law says that where there is a reckless misrepresentation of something to be true that is not true, where it's made without regard to whether it's true or false, even though one doesn't know that it's actually false but one doesn't take the trouble to verify whether it's true or not, and represents to another something to be true that is not in fact true, made [R264] for the purpose of inducing that

other to act, and that other relying on that misrepresentation and without knowledge of its falsity acts and thereby suffers damage, that the jury may award not only compensatory damages but punitive damages.

Now, for an innocent or a mistaken misrepresentation the law says that you can only award such damages as will reasonably compensate a plaintiff for the damages that he sustained as a result of the wrongful act. With deceit, dependent upon the severity of the offense, the law says that ordinarily a suppression of a fact, of a truth that you know and that the person you are dealing with doesn't know, ordinarily you are only entitled to compensatory damages. But where the act is so gross, so oppressive, or so malicious that it you might say shocks the conscience of the jury, that the jury may award punitive damages as well as compensatory damages.

You are the sole judges of that, ladies and gentlemen of the jury. Now, in compensatory damages in this case, if you determine that the plaintiff is entitled to a verdict, then, you have got to decide first of all what damages has he reasonably satisfied you that he suffered as a result of the wrongful act of the defendant. You heard the evidence. That's a matter for you, and whatever amount in dollars you feel would reasonably compensate him for the damages that he sustained, then, that would be the amount that you should fix as damages for the plaintiff. If you determine that the plaintiff is entitled to punitive damages, then, you not only give him such an amount as you feel would reasonably compensate him for any damages that he sustained, but such an amount as you feel, first of all, would punish the defendant for the wrongful act and, second, that would act as a deterrent to the defendant not to be guilty of this same kind of action in the future, and would warn others in the same position not to be guilty of a similar act.

Let me remind you that you are not to let sympathy, prejudice, or any other emotion determine your verdict. [R265] You took an oath here Monday morning, substantially: "I will well and truly try and a true verdict render in this case according to the law and the evidence so help me God." And that means strictly that your verdict will be based on the evidence that you heard here yesterday and the day before and on the instructions that I have been giving you for the last few minutes.

To bring in a verdict at all, all twelve of you must agree. If all twelve of you are not reasonably satisfied from the evidence that the plaintiff is entitled to a verdict, you couldn't bring in a verdict for the plaintiff. If all twelve of you are not reasonably satisfied that the plaintiff is entitled to a verdict, it would be your duty to bring in a verdict for the defendant. If all twelve of you are reasonably satisfied from the evidence that you heard in this case that the plaintiff has reasonably satisfied you that he has been the victim of a legal fraud as I have defined it to you and that he has been damaged as a result of that, then, he would be entitled to a verdict at your hands.

Let me tell you that you are not to resort to surmise, to speculation, or to conjecture in order to bring in a verdict for the plaintiff. The duty was on the plaintiff to reasonably satisfy you that he is entitled to a verdict. And, if you are not satisfied from the evidence that he is entitled to a verdict, then, you should not bring in a verdict for him.

I have had the clerk to prepare a form for your verdict. I want you to know that by having that prepared I wasn't trying to indicate to you what your verdict should be. It's merely a service to you to assist you. The two forms of that verdict are: "We, the jury, find for the plaintiff and assess his damages at blank dollars." After you have arrived at a verdict, if it's for the plaintiff, let your foreperson that you have selected or elected fill it in, sign it,

knock on that door and return it to the Court. If, as I said, all twelve of [R266] you are not reasonably satisfied that the plaintiff is entitled to a verdict, then, you should bring in a verdict for the defendant and the form of your verdict would be: "We, the jury, find for the defendant." Whatever it is, as I say, let your foreperson fill it in and bring it back.

Now, the law requires that after I finish these instructions, ladies and gentlemen of the jury, that I get you out of the room for a few minutes and give the lawyers an opportunity to point out any mistakes that I may have made or that they may think I have made, and I may have you back in here either to instruct you orally further or I may have some written charges to read to you. Don't begin your deliberations yet. Just—Do they have coffee down yonder?

Defendant's Exceptions to Charge

[R266] * * *

The Court: Okay. Let's go on with this. The plaintiff first. Do ya'll have any exceptions to the oral charge?

Mr. Biles: No sir.

The Court: Do you, sir?

Mr. Hewitt: No, sir.

The Court: Good. Damn, I wouldn't have let them go. (Laughter.) Go through these, now, and see if there is any—

Mr. Janecky: Well, that includes the ones that he gave.

The Court: No. Now, I'm going to ask you if there is any of your written charges that you feel weren't adequately covered and need to be read. And, first of all, of course, if [R267] you have got some exception to what I said that you wanted to put in the record, I don't mind you doing it.

Mr. Janecky: Judge, I have one as to the Court's oral charge. And that was throughout the portion that had to do with reliance. The Court never mentioned reasonable reliance, which is covered in some of our written charges. But we would request the Court charge the jury as to "reasonably rely." Throughout the charge it was all strictly reliance and there was no mention as to whether or not there was reasonable reliance, and I think that that's one of the—the cases say that's one of the elements.

The Court: Well, I started out with these pattern jury instructions and, hell, I don't remember seeing that anywhere.

Mr. Janecky: I don't believe it's in there, Judge, to be frank with you. The cases say that that's the standard, but those pattern jury instructions are slim.

The Court: Let me see your number 18 and I will see if I'm going to read it.

Mr. Janecky: We don't have it. This is just what I wrote up as a written request.

Defendant's Exceptions to Charge

The Court: Oh. (Pause.)

Mr. Janecky: I haven't shown it to plaintiff's attorneys yet.

The Court: You and him get over here and see what you think about this.

Mr. Matranga: I don't care about that. Yes, sir, that's all right with us.

The Court: Okay. I will read that to them. Anything else? By the way, I didn't ask you: Any of your written charges you need given?

Mr. Biles: If they are going to have theirs given, I want mine given.

The Court: I'm not going to—You don't need them if [R268] you don't need them, now.

Mr. Matranga: We don't need them.

Mr. Biles: We don't?

Mr. Matranga: No.

Mr. Biles: Okay. Withdraw them all.

The Court: Okay. Is there anything else you wanted?

Mr. Janecky: Judge, the only other thing was the number of times the Court charged regarding the allegations. We think it was a little bit duplicative and maybe a comment on the evidence. Of course, that's—

The Court: Well, of course, you can except to that.

Mr. Janecky: Yes, sir.

The Court: I don't think that would have anything to do with these written charges.

Mr. Janecky: About recharging, no, sir.

The Court: But are there any other of your written charges you want read to them because you feel I didn't adequately cover them?

Mr. Hewitt: Yes, sir. I would again like to ask the Court to read the one we submitted, number 18, I believe, Judge.

The Court: Well, I'm going to read it. The one he just wrote up.

Mr. Hewitt: I meant number 17, Judge.

The Court: Well, looks like that would be commenting on the evidence.

Mr. Biles: I think that was adequately covered, Your Honor.

The Court: I'm inclined to give it if he wants it given.

Mr. Janecky: That one does not contain the clear and satisfactory burden of proof.

Mr. Hewitt: That doesn't contain that.

Mr. Janecky: I think that's covered.

The Court: I'm not going to read that about clear and [R269] satisfactory. I told you- -

Mr. Hewitt: No, sir, no, sir. That's not in this.

The Court: I don't see that in here. If you want it read, I will read it.

Mr. Janecky: Judge, that one does contain the "reasonably rely" provision.

The Court: Well, that's the reason I want to read it. I want to be sure ya'll are satisfied.

Mr. Janecky: All right, sir. If you would that and that one, that would satisfy us, Judge.

The Court: Okay.

Mr. Matranga: Well, wait a minute, now. Why would the Judge have to read both of them. If he reads one—

The Court: Because I want to.

Mr. Matranga: That's all right with me.

(Recess.)

Mr. Janecky: Judge, also, for the record, as to the Court's oral charge, we still believe that evidence does not rise to the requirement of punitive damages and we would except to the Court's oral charge as to punitive damages.

The Court: Okay.

Now, what I'm going to do, you can tell him, Mr. Janecky, the charges that I mark refused I'm going to leave in here. I don't want to deny ya'll the right to test them. But all

the ones that I marked given that you didn't want, I'm going to deep-six them, now, and get them out of the record, except the ones that I'm actually going to give.

Mr. Janecky: All right, Judge. Judge, for the record—

The Court: You keep messing with this case, you are going to hurt my feelings.

Mr. Janecky: Well, I'm not, I just—I understand the given instructions are out, but we still have an exception as to the refused.

The Court: Certainly, and I'm leaving—I told him [R270] again—I have already explained it. That by throwing those out, I wasn't trying to deny you any right. Anything I did wrong, I want to be tested on it because I'm one fellow that's been accustomed to being reversed. I used to tell them, when they saw my name on the case they say reversed and then start looking for reasons.

Defendant's Motion for JNOV or in the Alternative for New Trial

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Civil Action No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

MOTION FOR JNOV, OR IN THE ALTERNATIVE FOR NEW TRIAL

Comes now the Defendant in the above styled and numbered cause, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, and moves the Court for an Order of Judgment in favor of the Defendant notwithstanding the verdict in the above referenced case, or in the alternative, an Order setting aside the verdict and ordering a new trial in the above referenced matter. As grounds, the Defendant would set forth the following:

1. The verdict is contrary to the preponderance of the evidence;

2. The verdict was motivated by passion, prejudice, or sympathy;

3. There was not a scintilla of evidence to support a verdict of fraud or deceit by the Defendant against the Plaintiff;

Defendant's Motion for JNOV or in the Alternative for New Trial

4. There was a complete absence of any gross, reckless, malicious or intentional action by the Defendant so as to warrant charging the jury on punitive damages;

5. The amount of the verdict was excessive under any view of the facts and the applicable law;

6. The Court failed to charge the jury on applicable elements of the Defendant's case.

7. The Court erred in overruling the Defendant's Motion for Directed Verdict at the close of the Plaintiff's case.

8. The Court erred in overruling the Defendant's Motion for Directed Verdict at the close of all the evidence.

9. The Court erred in granting Plaintiff's instructions 1-10.

10. The Court erred in refusing Defendant's instructions 1, 3, 4, 9, 12, 13, 14, and 15.

11. The Court erred in granting Defendant's instruction 2 without the appropriate language as to the burden of proof.

12. The Court erred in granting Defendant's instruction 5 without the appropriate language as to the burden of proof.

13. The Court erred in granting Defendant's instruction 6 without the appropriate language as to the burden of proof.

14. The Court erred in granting Defendant's instruction 11 without the appropriate language as to the burden of proof.

Defendant's Motion for JNOV or in the Alternative for New Trial

15. The Court lacks jurisdiction of this matter as this field has been preempted by federal law and federal jurisdiction, and the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, does not constitute a waiver of this.

16. And other errors and exceptions to be brought forth at oral argument.

/s/ Floyd G. Hewitt, Jr.
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Defendant Requests Oral Argument.

/s/ J. F. Janecky
J. F. Janecky

Opinion of Supreme Court of Alabama

(Filed May 10, 1985)

The State of Alabama—Judicial Department

THE SUPREME COURT OF ALABAMA

October Term, 1984-85

83-710

International Longshoremen's Association, etc.

v.

Larry Davis

Appeal from Mobile Circuit Court

Jones, Justice.

The threshold issue is whether federal preemption is a waivable defense. Plaintiff argues that Defendant Union's post-trial allegation of federal preemption was insufficient to preserve the issue for our review. On the other hand, Defendant Union argues that asserting federal preemption in a post-trial JNOV motion is sufficient to preserve the issue for appellate review, because the National Labor Relations Act preempts the state courts of subject matter jurisdiction, the lack of which may never be waived and thus can be asserted at any time. We hold that, under the circumstances of this case, federal preemption is an affirmative defense[1] which not only can be waived, but must be

[1] Although federal preemption is not specifically listed in A.R. Civ.P. 8(c) as an affirmative defense, it quite obviously falls within the nature of those defenses specifically listed. See, also, *Powell* v. *Phenix Federal Sav. & Loan Ass'n*, 434 So. 2d 247 (Ala. 1983).

affirmatively pleaded in order to avoid waiver. Thus, Defendant Union's JNOV motion alleging federal preemption was insufficient to preserve that issue for our review.

In so holding, we are not unmindful of contrary holdings of other state courts supporting Defendant Union's position that the National Labor Relations Act preempts a state's subject matter jurisdiction. See, *e.g., Consolidated Theatres* v. *Theatrical Stage Employees' Union, Local 16,* 69 Cal. 2d 713, 73 Cal. Rptr. 213, 447 P.2d 325 (1968); *Chicago & North Western Railway Co.* v. *La Follette,* 27 Wis. 2d 505, 135 N.W. 2d 269 (1965); *General Building Contractors' Association* v. *Local Unions Nos. 542, 542-A and 542-B,* 370 Pa. 73, 87 A. 2d 250 (1952).

Each of these courts asserts its holding of federal preemption summarily and without supporting precedent. Once the "subject matter" premise is accepted, the result that the preemption issue may be raised for the first time on appeal and judicially reviewed on its merits is a foregone conclusion. Subject matter jurisdiction can neither be conferred by agreement nor can it be waived. Indeed, it is incumbent upon the court to notice subject matter jurisdiction *sua sponte.*

It is not the conclusion, given the assumed premise, with which we disagree. Our disagreement consists in *what* is preempted. It is not the circuit court's subject matter jurisdiction to adjudicate a damage claim for the tort of fraud —even if it arises in the context of a labor-related dispute —that is preempted. Rather, it is the state court's *exercise* of that power that is subject to preemption.[2]

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[2] It is important to note that our reference to "subject to preemption" preserves the distinction between the procedural question of when the issue must be raised to invoke appellate review and the resolution of the preemption issue on the merits. The *La Follette* court, *supra,* recognized and applied this distinction when it

(footnote continued on following page)

This distinction between federal preemption of subject matter jurisdiction and preemption of the state court's exercise of its authority is more than a mere play on words. It goes to the very nature and character of the power of the state courts to function within the constitutionally created system of federalism, invoking significant public policy considerations. Undisputedly, the Supremacy Clause authorizes the United States Congress, if not otherwise constitutionally proscribed, to legislate in matters in which the states are also empowered to act. The federal legislation (or regulations pursuant thereto) may authorize concurrent jurisdiction (*e.g.,* Federal Employers Liability Act); it may preempt state law (*e.g.,* 12 C.F.R. § 545.8-3(f) (1982));[3] it may preempt the state court's exercise of its otherwise valid jurisdiction over a particular field of law (*e.g.,* National Labor Relations Act); or it may create a body of law unknown to state law (*e.g.,* Bankruptcy Reform Act of 1978).

(footnote continued from previous page)

accepted for review the issue raised initially on appeal, but upon review on the merits rejected the preemption issue as a defense.

Likewise, if we were to rule on the merits, we could not find that the state court's jurisdiction is federally preempted. The instant facts fall squarely within the "peripheral concern" exception to federal preemption of state jurisdiction of labor-related disputes. *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 243-44 (1959). The National Labor Relations Board has already determined that an employer's supervisors are not protected by the Labor Management Relations Act. Thus, in this case, Plaintiff has no remedy before the NLRB, and this dispute, although somewhat labor-related, is, at most, only of "peripheral concern" to the NLRB. See, *e.g., Linn* v. *United Plant Guard Workers Local 114,* 383 U.S. 53 (1966).

[3] While *Powell,* see n. 1, dealt with federal preemption of state law rather than preemption of subject matter jurisdiction, its holding, requiring that the preemption defense be raised in the trial court, is totally consistent with the instant opinion.

To be sure, the Bankruptcy Reform Act is an excellent example of pure subject matter jurisdiction. If a state court "adjudicates" one of its citizens "a bankrupt," such adjudication would be subject to attack as void at any time by any affected party, or by the *sua sponte* action of another court. The very subject matter of bankruptcy has been preempted by federal law. In like manner, if a state court of limited jurisdiction (*e.g.*, an Alabama district court) convicted an accused of capital murder and sentenced him to die, the conviction and sentence would be void for lack of subject matter jurisdiction.

Central to our holding is the general jurisdiction of the Mobile Circuit Court, Art. VI, § 6.04, Amendment 328, Ala. Const. 1901, and the nature of the claim. This is an ordinary misrepresentation suit filed in a court of general jurisdiction. Clearly, the Mobile Circuit Court has jurisdiction over claims for damages based on allegations of misrepresentation. Code 1975, § 6-5-101, *et seq.*

We contrast the instant case with a bankruptcy suit filed in a state circuit court or a capital murder case tried in a state district court. In both instances, neither court has subject matter jurisdiction. The state circuit court, although a court of general jurisdiction, has no jurisdiction over the bankruptcy suit because remedies of this nature exist only by virtue of federal law and exclusively in the federal forum. To like effect, the district court is a court of limited jurisdiction and by state law has no power to try capital murder cases. In neither of these examples could subject matter jurisdiction be conferred by agreement, and thus the defense of lack of subject matter jurisdiction could not be waived; therefore, the judgments could be set aside at any time as void, either on direct or on collateral attack, and whether or not the issue of jurisdiction was raised in the trial court.

We turn now to the public policy consideration invoked by Appellant's argument for subject matter jurisdiction

and the right to present this issue for appellate review on the merits. Indeed, the instant case is illustrative of these policy considerations, for not until the completion of a trial of several days and an adverse verdict did the Union allege federal preemption. Not only is judicial economy at stake, but it is grossly unfair to the trial judge whose ruling with respect to preemption was never invoked. When a party, as "sophisticated" in federal labor law as is the Defendant Union, first alleges federal preemption at the post-trial stage, it is more than mere speculation to assume that it was a deliberate attempt to have "two bites at the same apple"—the two bites being litigation in state court on the merits, and, failing there, a post-judgment attack on grounds of subject matter jurisdiction.

To hold otherwise, under these circumstances, and allow the union to gamble on the result and then belatedly assert the preemption defense is to impugn the integrity of the judicial process. To one who would attempt two such bites at the apple, we are constrained to reply simply, "Not in our orchard."

We have carefully reviewed the Appellant's alternative state law grounds for reversal and find each of them to be without merit.

AFFIRMED.

Maddox, Faulkner, Almon, Embry, Beatty, and Adams, JJ., concur.

Torbert, C. J., and Shores, J., concur in the result.

Opinion of Supreme Court of Alabama

SHORES, JUSTICE (concurring in the result):

I have been cited to no case, nor have I found one, which convinces me that the plaintiff's state action for fraud and misrepresentation is preempted by federal law. For this reason, I would not base the decision to affirm the judgment on the ground that the defendant waived its defense by not raising it in time, but would simply hold that federal preemption is not a valid defense under the facts of this case.

Torbert, C. J., concurs.

JOINT

APPENDIX

(5)

No. 85-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Appellant,

v.

LARRY DAVIS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

JOINT APPENDIX

THOMAS W. GLEASON
26 Broadway, 17th Floor
New York, New York 10004
(212) 425-3240
Attorney for Appellant

WILKINS, BANKESTER & BILES, P.A.
P.O. Box 1140
Bay Minette, Alabama 36507
(205) 937-7024
Attorneys for Appellee

JURISDICTIONAL STATEMENT FILED AUGUST 8, 1985
PROBABLE JURISDICTION NOTED OCTOBER 15, 1985

105 P

TABLE OF CONTENTS

This is a reprinted Joint Appendix. Certain Exhibits have been deleted, but the original pagination has been maintained.

Circuit Court of Mobile County Docket Entries

CONSOLIDATED FOR TRIAL

State of Alabama
Supreme Court
Dept. of Court Mgmt.
FORM SC-C-5A 1/77

CIVIL CASE ACTION SUMMARY

TRIAL JUDGE: KITTRELL

CV 81 002314
ID YR NUMBER

IN THE CIRCUIT COURT OF MOBILE COUNTY

ORI 002015J CASE NUMBER CV 81 002314
ID YR NUMBER

PLAINTIFF'S NAME	DEFENDANT'S NAME
LARRY DAVIS	INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

PLAINTIFF'S ATTORNEY
WILKINS, BANKESTER & BILES, P.A.
BY: Claude E. Bankester Bayless Biles
P. O. Box 1140
Bay Minette, Alabama 36507

DEFENDANT'S ATTORNEYS
FLOYD G. HEWITT, JR.
P.O. Box 543, Biloxi, Miss 39533
KENNETH O. SIMON
J. F. JANECKY

FILING DATE
10/5/81

CASE TYPE	AMOUNT
false representation	$500,000.00

JUDGE ID	JURY	PLAINT INDIG.	DATES
NAME	YES [X]	YES ☐	SET FOR TRIAL

Circuit Court of Mobile County Docket Entries

DATE	BENCH NOTES, ORDERS, JUDGMENTS, ACTIONS, MINUTES, ETC., RECORD OF:
10– 5–81	Complaint & Summons sent by Certified Mail, Return Receipt Requested, Addressed to: International Longshoremen's Association, c/o J. H. Raspberry, District President, 1821-27 The Strand, Galveston, Texas 77550
	**C&S served on International Longshoremen's Association by Certified Mail, Receipt signed by J. H. Raspberry on October 26, 1981.
11–17–81 n/a J.sec.	Defendant's motion for Court to grant an additional 30 days to answer the complaint.
	December 11, 1981—Motion Granted.
12–15–81	Answer of defendant
12–15–81	Defendant's notice of request for production of documents and things to plaintiff
12–15–81	Defendant's request for production of documents and things to plaintiff.
12–15–81	Defendant's first set of interrogatories to the plaintiff.
12–15–81	Defendant's notice of interrogatories to the plaintiff.
2–17–82	Notice of taking deposition of Larry Davis
3 –4–82	Plaintiff's response to request for production of documents
3 –8–82	Plaintiff's answers to interrogatories.
4 –2–82	Deposition of Larry James Davis.
5 –5–82	General Pre-Trial Order

Circuit Court of Mobile County Docket Entries

DATE	BENCH NOTES, ORDERS, JUDGMENTS, ACTIONS, MINUTES, ETC., RECORD OF:
6–22–82	Defendants' motion for court to enter a summary judgment or in the alternative, a partial summary judgment.
	August 20, 1982—Motion submitted.
	September 8, 1982—Motion Denied.
7–16–82	Plaintiff's supplemental answers to interrogatories.
7–29–82	Affidavit in opposition to motion for summary judgment or in the alternative partial summary judgment.
8–16–82	Plaintiff's motion for court to consolidate this case with CV-82-000908 for trial.
n/a J.sec.	September 9, 1982—Motion Granted.
9– 2–82	Joint motion of parties for court to continue the trial from September 13, 1982.
	September 8, 1982—Motion Granted.
9– 9–82	Defendant's memorandum in support of the motion for summary judgment, or in the alternative, partial summary judgment of the defendant, International Longshoremen's Association.
8–16–82	Defendant's motion for court to reconsider its previously filed request for oral argument in opposition to request of plaintiff to consolidate trial of his cause with trial of CV-82-000908.
	February 18, 1983—Motion Denied.
9–28–82	Deposition of Johnny J. Amacker.

Circuit Court of Mobile County Docket Entries

DATE	BENCH NOTES, ORDERS, JUDGMENTS, ACTIONS, MINUTES, ETC., RECORD OF:
9–28–82	Deposition of James H. Baker, III.
9–28–82	Deposition of John William Johnson, Sr.
9–28–82	Deposition of Michael Arnold Young.
	May 16, 1983—Case crowded out, Court in trial of another civil matter.
8–12–83	Defendant's second set of request for production to Plaintiff Ben Trione
8–12–83	Defendant's request for admissions to Ben Trione
8–12–83	Defendant's second set of interrogatories to plaintiff Ben Trione
8–12–83	Defendant's motion for court to dismiss the complaint or in the alternative, to sever and continue complaint and trial of Ben Trione from Larry Davis.
	October 28, 1983—Motion to dismiss complaint of Ben Trione (Plaintiff in CV-82-000908) Granted.
11– 8–83	Appearance of counsel for the Defendant.
11–15–83	Defendant's motion for directed verdict at the close of the plaintiff's case.
	November 15, 1983—Motion denied.
11–15–83	Defendant's motion for directed verdict at the close of all the evidence.
	November 15, 1983—Motion denied.
11–16–83	2 jury charges given for defendant.

Circuit Court of Mobile County Docket Entries

DATE	BENCH NOTES, ORDERS, JUDGMENTS, ACTIONS, MINUTES, ETC., RECORD OF:
11–16–83	8 jury charges refused defendant.
	November 16, 1983—Jury and verdict for the plaintiff and against the defendant for the sum of $75,000.00.
	This day in open Court, a lawful jury, having heard the evidence and the charge of the Court, did return the following verdict: "We, the jury, find for the plaintiff, against the defendant and assess damages at $75,000"; and the Court now desires to enter a final judgment in this case. It is therefore ordered and adjudged by the Court that a final judgment in favor of the plaintiff, Larry Davis, and against the defendant, International Longshoremen's Association, in the sum of $75,000.00, be and hereby is entered with costs taxed in favor of the plaintiff, Larry Davis, and against the defendant, International Longshoremen's Association, for the recovery of which let execution issue in accordance with Rule 62(a) of the Alabama Rules of Civil Procedure.
12–13–83	Defendant's motion for court to enter an order of judgment in favor of Defendant, notwithstanding the verdict in this case or in the alternative set aside the verdict and order a new trial.
	February 17, 1984—Motion Denied.
3–26–84	Notice of Appeal to the Supreme Court filed this dated by the defendant from the Jury and Verdict of November 16, 1983, finding in

Circuit Court of Mobile County Docket Entries

DATE	BENCH NOTES, ORDERS, JUDGMENTS, ACTIONS, MINUTES, ETC., RECORD OF:
	favor of the plaintiff or the sum of $75,000.00, and from the order of February 17, 1984, denying defendant's motion to enter a judgment in favor of defendant, notwithstanding the verdict or in the alternative to set aside the verdict and order a new trial.
3–26–84	Security for costs filed with Nettles, Barker & Janecky, By: J. F. Janecky.
3–26–84	Designation of Record on Appeal.
3–26–84	Supersedeas Bond in the amount of $93,750.00, filed with The Aetna Casualty and Surety Company as surety.
3–26–84	Letter of Transmittal.
3–26–84	$100.00 docket fee.
4–20–84	Appeal Docketed. No. 83-710.
4–24–84	Judge's order granting Trial Clerk 14 day extension.

Supreme Court of Alabama Docket Entries

83-710

470 So.2d—1215

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ETC. — LARRY DAVIS

Clerk
Mobile Circuit Court CV-81-02314

Telfair J. Mashburn Judge

Floyd G. Hewitt, Jr.
P. O. Box 543
Biloxi, MS 39533

J. F. Janecky
P. O. Box 2987
Mobile, AL 36652
432-8786

Briefs Filed: 10-16-84
(9 copies)

Reply Briefs Filed: 11-30-84
(9 copies)

Claude E. Bankester
P. O. Box 1140
Bay Minette, AL 36507
Bayless Biles
937-7024 or
947-2244

Briefs Filed: 11-13-84
(9 copies)

Supplemental Briefs Filed:
3-25-85 (9 copies)

Judgment Date
November 16, 1983 PJO: Dec. 13, 1983 Feb. 17, 1984

Judgment Appealed From exceeds $10,000

Notice of Appeal filed in trial Court March 26, 1984

Security for Costs: appt w/w — Docket Fee $100
4/12/84co

Supreme Court of Alabama Docket Entries

Certificates of Completion

5–10	Clerk's Record	5– 8–84
9–13–84	Reporter's Transcript	9–10–84
9–20–84	Record on Appeal	9–17–84
10–22–84	Supp. Clerk's Rcd	10–18–84

Extensions of Time-Briefs

10–15	Appellant cbt 10-9-84	10–22–84
10–30–84	Appellee	11–13–84
11–20–84	Appellant Reply cbt 11-19-84	12– 4–84

Extensions of Time

4–24–84	TJ/Clerk's Record	14d	5– 7–84
5–23	TJ/Reporter's Transcript	28	
	TJ/Reporter's Transcript		
	TJ/Record on Appeal		
6–25	SC/CR		7–30–84
8/ 2	SC/CR	28d	8/27/84
8/30	SC/CR	14	9–10–84

12–18–84	Record File A/C/N	2u/ak
	Supplemental Vol.	
	Appendix Filed A/N	Exhibits
12–18–84	Second Copy Record Filed	2u/ak
10–16–84	Oral Argument Requested by Appt	Denied
	Oral Argument Granted	
	O/A Set 1:30	3–18–85

Supreme Court of Alabama Docket Entries

3–18–85	Submitted Argued & Submission Withheld Division Torbert, C.J., Maddox, Jones, Shores & Beatty, JJ.
4– 1–85	Submitted after filing letter briefs
5/10/85	Judgment AFFIRMED
5/10/85	Opinion By JONES, J.
5/10/85	Concurrences MA, FA, AL, EM, BE & AD, JJ., CONCUR; TOR, CJ., & SH, J., CONCUR IN THE RESULT
	Application for Rehearing Filed
	Action on Rehearing
MAY 30 1985	Certificate of Judgment Issued
5–30–85	Library Fee Transferred-$5.00
10–18–84	Letter from Ben Harris recommending and introducing Charles R. Goldburg to appear in case pro hac vice in association with J. F. Janecky of Mobile. RGE-sjm
3–18–85	Submission withheld 7 days for appellee to submit letter brief and 7 days for appts to reply.
5/23/85	1cc Appellant's Notice of appeal filed with USSC/awk-dn

Appellant's Counsel Cont'd

Thomas W. Gleason 212 425-3240
Chrles R. Goldburg
Susan G. Barres
90 Broad Street
Suite 600
NY, NY 10004

Suppl. letter BRIEFS FILED: 4-4-85 (10 copies)

Unfair Labor Practice Charge Filed by Ben Trione

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 15-CA-8138

Date Filed April 24, 1981

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: Ryan-Walsh Stevedoring Co., Inc.

b. Number of Workers Employed: 700 (approximately)

c. Address of Establishment (Street and number, city, State, and ZIP code)

d. Employer Representative to Contact: B. H. Green, Jr.

e. Phone No.

f. Type of Establishment (Factory, mine, wholesaler, etc.): Stevedore

g. Identify Principal Product or Service: Loading and unloading ships

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since, on or about April 13, 1981, the above named employer interfered with the rights of its employees to engage in concerted activity for mutual aid and protection; and by discrimination in regard to tenure and conditions of employment, discouraged membership in or adherence to an organization of its employees; in that on or about said date said employer discharged employee Ben Trione for the reasons aforesaid

NLRB
REGION 15
APR 24 10 43 AM '81
NEW ORLEANS, LA

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Ben Trione, an individual

4a. Address (Street and number, city, State, and ZIP code)
East Park Plaza
7 Market Street, Montrose, Alabama 36559

4b. Telephone No.
205
928-1161

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By: (Signature of representative or person filing charge) (Title, if any)

Gregory B. Stein
405 Van Antwerp Building
P.O. Box 1051
Address: Mobile, Alabama 36633

205 433-2000 (Telephone number)

4/23/81 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18,

Complaint

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

VS.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, an unincorporated association or a corporation, the exact legal status of which is unknown, but will be supplied by amendment when ascertained,

Defendant.

COMPLAINT

1. Prior to April 12, 1981, and on that date, Plaintiff had been and was employed by Ryan-Walsh Stevedoring Company, Inc. (hereafter Ryan-Walsh), a corporation, in Mobile, Alabama, as a ship superintendent.

2. As a ship superintendent for Ryan-Walsh, Plaintiff was a supervisor within the meaning of the National Labor Relations Act, 29 U.S.C., §152(11), and could not legally join Defendant Union or the Locals of Defendant Union representing other employees of Ryan-Walsh for collective bargaining purposes, to-wit, Local 1410 and Local 1985.

3. In an attempt to organize the ship superintendents employed by Ryan-Walsh, Defendant, on or about April 12, 1981, requested of Plaintiff and other ship superintendents employed by Ryan-Walsh that Plaintiff and such other employees execute a charter application to Defendant for the "Walking Foreman in the Port of Mobile," and

pledge cards of Defendant, and represented to Plaintiff and other ship superintendents employed by Ryan-Walsh that Plaintiff and other ship superintendents could legally become members of Defendant Union; that they would be protected by Defendant against any action taken by Ryan-Walsh against Plaintiff and other ship superintendents for their participation in organizing such ship superintendents for Defendant Union; and that if Plaintiff was fired by Ryan-Walsh, Defendant would get his job back with back pay.

4. The representations made by the Defendant were false and the Defendant knew that they were false.

5. Plaintiff believed the representations and in reliance upon them signed the pledge and charter application referred to above, and refused to cross the picket line set up by Defendant. Plaintiff's employment was then terminated by Ryan-Walsh because of his said participation in the attempted organization of said ship superintendents.

6. Because of his being discharged by Ryan-Walsh, Plaintiff was unable to obtain employment with anyone else in a stevedoring or related job, has lost wages, has been embarrassed and humiliated, and has suffered great mental pain and anguish.

WHEREFORE, Plaintiff demands judgment against Defendant for FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS and costs.

WILKINS, BANKESTER & BILES, P.A.

BY: /s/ CLAUDE E. BANKESTER
CLAUDE E. BANKESTER
Attorney for Plaintiff
P. O. Box 1140
Bay Minette, Alabama 36507

Plaintiff respectfully demands a trial by jury in this cause.

/s/ CLAUDE E. BANKESTER
Attorney for Plaintiff

SERVE DEFENDANT BY REGISTERED MAIL AT:

c/o J. H. Raspberry
District President
International Longshoremen's
Association
1821-27 The Strand
Galveston, Texas 77550

Answer

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, an unincorporated association or a corporation, the exact legal status of which is unknown, but will be supplied by amendment when ascertained

Defendant.

ANSWER

TRIAL BY JURY REQUESTED

Comes now INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, a Defendant named in the above styled and numbered cause, by and through its counsel, and files this its Answer to the Complaint and would show the following, to-wit:

FIRST DEFENSE

This Court lacks jurisdiction over the person of the INTERNATIONAL LONGSHOREMEN'S ASSOCIATION.

SECOND DEFENSE

There is an insufficiency of process and an insufficiency of service of process on the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION.

Answer

THIRD DEFENSE

The Complaint fails to state a claim upon which relief can be granted or it fails to state a cause of action against the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION.

FOURTH DEFENSE

Now answering the allegations of the Compiaint, paragraph by paragraph, the Defendant says as follows, to-wit:

I.

Answering the allegations contained in paragraph 1. of the Complaint, the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION is without knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph, and, therefore, denies same.

II.

Answering the allegations contained in paragraph 2. of the Complaint, the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION is without knowledge or information sufficient to form a belief as to whether or not the Plaintiff was a supervisor within the meaning of Section 152(11) of the Labor Management Relations Act of 1947 (29 U.S.C. 152(11)) and, therefore, denies same. Further, the Defendant specifically denies that Section 152(11) of said Act prohibits any individual employed as a supervisor from either becoming or remaining a member of a labor organization; providing, however, that no employer subject to said Act can be compelled to deem said individual, if, in fact, he is a supervisor, as an employee for collective bargaining purposes. The Defendant denies each and every remaining material allegation contained in said paragraph.

Answer

III.

Answering the allegations contained in paragraph 3. of the Complaint, the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION denies ever having any communication of contacts with the Plaintiff or anyone else; specifically denies each and every allegation contained in said paragraph; and demands strict proof thereof. Further, the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION would move to strike any and all references by the Plaintiff to "other ship superintendents" or "other employees" in said paragraph as they are not parties to the suit and the Plaintiff has no standing to make a claim on their behalf.

IV.

Answering the allegations contained in paragraph 4. of the Complaint, the Defendant denies ever having made any representations to the Plaintiff and, therefore, must also deny each and every material allegation contained in said paragraph.

V.

Answering the allegations contained in paragraph 5. of the Complaint, the Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained therein and, therefore, denies same.

VI.

The Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, denies each and every material allegation contained in paragraph 6. of the Complaint, and demand strict proof thereof.

VII.

AND, answering the last unnumbered paragraph of the Complaint, the Defendant, INTERNATIONAL LONGSHOREMEN'S

Answer

ASSOCIATION denies all of same and denies that the Plaintiff is entitled to any judgment in any amount whatsoever of or from the Defendant and the Defendant respectfully requests to be dismissed herefrom with its costs.

Respectfully submitted,

BRYAN, NELSON, ALLEN, SCHROEDER AND COMPTON

By: /s/ FLOYD G. HEWITT, JR.
FLOYD G. HEWITT, JR.

NETTLES, COX & BARKER

By: /s/ KENNETH O. SIMON
KENNETH O. SIMON
Attorneys for the Defendant
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

Answer

CERTIFICATE OF SERVICE

I, FLOYD G. HEWITT, JR., of the law firm of BRYAN, NELSON, ALLEN, SCHROEDER AND COMPTON, attorneys for the Defendant in the above styled and numbered cause, do hereby certify that I have this day forwarded, via United States mail, postage prepaid, a true and correct copy of the above and foregoing Answer to the Honorable Claude E. Bankester, attorney for the Plaintiff, at his usual and regular mailing address of Post Office Box 1140, Bay Minette, Alabama 36507.

THIS, the 14th day of December, 1981.

/s/ FLOYD G. HEWITT, JR.
FLOYD G. HEWITT, JR.

FLOYD G. HEWITT, JR.
BRYAN, NELSON, ALLEN, SCHROEDER
AND COMPTON
Attorneys at Law
Post Office Box 543
Biloxi, MS 39533

KENNETH O. SIMON
NETTLES, COX & BARKER
Attorneys at Law
Post Office Box 2987
Mobile, Alabama 36652
Telephone: (205) 432-8786

Defendant's Motion for Summary Judgment

IN THE
CIRCUIT COURT OF MOBILE COUNTY, ALABAMA
Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

versus

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, an unincorporated association or a corporation, the exact legal status of which is unknown, but will be supplied by amendment when ascertained,

Defendant.

MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

Comes now INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, the Defendant in the above styled and numbered cause and, pursuant to Rule 56, of the Alabama Rules of Civil Procedure, respectfully moves this Court to enter Summary Judgment, or, in the Alternative, Partial Summary Judgment, in favor of this Defendant on the grounds that there is no genuine issue as to any material fact, and this Defendant is entitled to judgment as a matter of law. This Motion is based upon (1) the face of the Complaint, (2) the deposition of the Plaintiff, LARRY DAVIS, and (3) responses to discovery requests of the Defendant.

Respectfully submitted,

BRYAN, NELSON, ALLEN,
SCHROEDER AND COMPTON

By: /s/ FLOYD G. HEWITT, JR.
FLOYD G. HEWITT, JR.

NETTLES, BARKER & JANECKY

By: /s/ KENNETH O. SIMON
KENNETH O. SIMON

Affidavit in Opposition to Motion for Summary Judgment

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

VS.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

Personally appeared before me, the undersigned authority, Larry Davis, being known to me, and who being by me first duly and legally sworn, under oath doth depose and say as follows:

I am Larry James Davis, and I am the same Larry Davis who has filed Case No. CV-81-002314 against International Longshoremen's Association and I make this affidavit on personal knowledge. Prior to May 18, 1981, I was employed by Ryan-Walsh Stevedoring Company of Mobile, Alabama, as a ship superintendent. On April 12, 1981, I attended a meeting of ship superintendents along with some twelve to fifteen other ship superintendents who worked for various other stevedoring companies in Mobile, Alabama, where Mr. Benny Holland was present and representing International Longshoremen's Association. At the meeting of April 12, 1981, Mr. Benny Holland represented himself to me and the other people who were at the meeting as the Secretary/Treasurer of the South Atlantic and Gulf Coast District of the International Longshoremen's Association. The purpose of the meeting with Mr. Benny Holland was to discuss the formation of a union for the ship superintendents who worked at the Port of Mobile, Alabama. At said meeting, Mr. Benny Holland told me and all of the other people present that we could form a union and that if we did form a union, the International Longshoremen's Association would stand behind us. Mr. Holland further stated that if we signed the application for charter and paid the charter fee, and then lost our jobs, the International Longshoremen's Association would get our jobs back for us with back pay.

I believed what Mr. Holland stated to us at the meeting, and I relied on him and believed that he was in the position to know the capabilities of the International Longshoremen's Association and to know the legality of the acts that he was asking us to perform. In reliance upon Mr. Benny Holland and the statements which I have referred to above, I signed the application for charter on April 12, 1981, seeking to become a member of a ship superintendent's union organized under the International Longshoremen's Association. On May 18, 1981, I was fired from my job at Ryan-Walsh Stevedoring Company because I had sought to become a member of a union and ship superintendents are not protected by the National Labor Relations Act. I did not know that it was illegal for me to attempt to unionize and I had no knowledge that I was not protected by the National Labor Relations Act. I relied totally upon Mr. Benny Holland, who assured me that if I lost my job, I would get it back with back pay and that

Affidavit in Opposition to Motion for Summary Judgment

the International Longshoremen's Association would see to it that I did.

/s/ LARRY DAVIS
LARRY DAVIS

SWORN to and subscribed before me on
this the 27th day of July, 1982.

/s/ VICKI BARTWELL SPRINKLE
Notary Public

Of Counsel:

WILKINS, BANKESTER & BILES, P.A.
Attorneys for Plaintiff
Post Office Box 1140
Bay Minette, AL 36507

Plaintiff's Exhibit 1

(Letter dated September 22, 1980 from W.F. Arnett to Stevedoring Interests)

(Letterhead of South Atlantic and Gulf Coast, District, I.L.A.)

From the desk of:

EMILY C. MOSES
Executive Secretary to District President

March 6, 1981

Mr. Trione, this is the information you requested to be sent to you.

/s/ MRS. MOSES

(Letterhead of West Gulf Maritime Association)
Houston, Texas 77002

September 22, 1980

Stevedoring Interests
Employing Walking Foremen under terms of the
Houston-Galveston-Freeport Walking Foreman Agreement

Gentlemen:

The negotiations with the Walking Foremen under their Houston-Galveston-Freeport Agreement have been concluded. The following is a synopsis of terms of settlement.

1. Rule 1. Will be amended to provide for the following guarantee:

   "Walking Foremen ordered for any a.m. starting time (7:00 a.m., 8:00 a.m., 10:00 a.m.) will be paid from 7:00 a.m. If returned for 1:00 p.m., will be be paid until 6:00 p.m. Walking Foremen ordered

Plaintiff's Exhibit 1—Letter dated September 22, 1980 from W.F. Arnett to Stevedoring Interests

for a 1:00 p.m. starting time will be paid from 8:00 a.m. and will be paid until 6:00 p.m. except on election days and pay days." One walking foreman per gang.

2. Rule 5. The straight time wages to be paid to Walking Foremen and the effective date shall be as follows:

Oct. 1, 1980	Oct. 1, 1981	Oct. 1, 1982
$14.20	$15.40	$16.50

In addition to the above wage rates, Walking Foreman to receive same commodity differentials as longshoremen/longshore gang foreman. When securing, Walking Foreman to receive $.10/hr differential *only*. They are not to receive tool differential paid to longshoremen for furnishing their own tools. Walking Foremen will not receive any differential when working cotton. (Note: Wage rates, including differentials, straight time, overtime and double time will be scaled in Rule #5.)

3. Rule 18.

Rule 18 will be amended to provide that two (2) Walking Foremen will be employed on the Weather Deck of a RO-RO ship whenever two cranes are being used in the operation.

4. New Rule

A new rule will be added which will provide that when a multiple number of barges is being worked, the number of barges actually being worked must be within the confines of six hundred (600') feet. Example: if a string of ten (10) barges is to be worked 1 2 3 4 5 6 7 8 9 10 barges 1 thru 5 or 2 thru

Plaintiff's Exhibit 1—Letter dated September 22, 1980 from W.F. Arnett to Stevedoring Interests

6 or 3 thru 7, etc. can be worked. In other words, the limit of 600' is a 'floating' 600'. If the 600' is exceeded a second Walking Foreman must be employed.

5. The Walking Foremen's Committee will be given a 'Memorandum' which will require the Employers to meet with the Walking Foremen at such time as the Court Ordered merger of the local unions takes place. The purpose of this commitment will be to discuss Walking Foremen manning requirements under a one local system.

6. New Rule

"Walking Foremen are required to wear hard hats on all jobs."

7. New Rule

"Walking Foremen are to comply with and make all reasonable efforts to enforce Employer policies designed to achieve compliance with the Occupational Safety and Health Act of 1970, as amended, and other applicable rules and regulations on safety and health."

The Employers will attempt to work out a more compatable Walking Foreman vacation rule for the Port of Freeport.

Very truly yours,

WEST GULF MARITIME ASSOCIATION

/s/ WM. F. ARNETT
Wm. F. Arnett
President

WFA/bp

Plaintiff's Exhibit 2

(Letter dated April 10, 1981 from J.H. Raspberry to Ben Trione)

(Letterhead of South Atlantic and Gulf Coast District, International Longshoremen's Association, AFL-CIO)

April 10, 1981

Mr. Ben Trione
P. O. Box 121
Montrose, Alabama 36559

Dear Mr. Trione:

Replying to the request with regard to securing a charter for Walking Foremen in the Port of Mobile, I am listing below the steps which must be taken for the issuance of same.

> Fill in the charter application enclosed, and have the persons sign their names—do not type in names.

The charter application together with a check made payable to the International in the amount of $100.00 for charter fee and $1.35 per capita tax on each person applying for the charter for 1 month, and a check made payable to the South Atlantic and Gulf Coast District ILA in the amount of 50¢ per capita tax on each person applying for the charter for 1 month.

Forward the charter application, the check for the International and the check for the District to me, and when I receive all of this, I will then poll the District Executive Board for approval or disapproval. If the Board approves the issuance of the charter, I will then request Secretary Treasurer Hasselgren to issue the charter.

Plaintiff's Exhibit 2—Letter dated April 10, 1981 from J.H. Raspberry to Ben Trione

All of these steps must be taken in proper sequence, and I wish to further advise that after the charter is issued; I expect the persons covered under a negotiated agreement to sign the 1% Service Charge Check Off Authorization slips.

Sincerely,

/s/ J. H. RASPBERRY
J. H. Raspberry, District President

JHR/em
opeiu #27,
afl-cio

Plaintiff's Exhibit 3

(Pledge Card signed by Angelo B. Trione)

PLEDGE CARD

I, the undersigned, employee of Lyani Walsh

....., employed as Stevedore Superintende

hereby authorize International Longshoremen's Association, AFL-CIO, to represent me for the purposes of collective bargaining, respecting rates of pay, wages, hours of employment, or other conditions of employment in accordance with applicable law.

NAME: Angelo B. Trione

Home Address: P.O. 121 Montrose, Ala

Phone: 929-1161 Soc. Sec. No.: 421-26-584

Date: 4-9-81

Angelo B. Trione

Local: ..... 54 Employee's Signature

Plaintiff's Exhibit 4

(Application for Charter to International Longshoremen's Association, AFL-CIO)

INTERNATIONAL

Longshoremen's Association

Application for Charter

Dated 4-12, 1951

We, the undersigned, residents of Mobile Ala

believing the INTERNATIONAL LONGSHOREMEN'S ASSOCIATION to be well calculated to improve our social and intellectual position, and to promote our industrial well being and advancement, respectfully petition the

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

to grant us a charter to open a new Local Union, in the City of Mobile

County of Mobile State of Ala and we pledge ourselves, individually and collectively to be governed by the Constitution, Rules and Usages of the INTERNATIONAL LONGSHOREMEN'S ASSOCIATION.

NAME	NAME
Angelo B. Triche	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]

Class of Work Stevedore Superintendent

Charter to be sent to Angelo B Triche Address P.O. Box 1218 Mobile Ala.

Take Notice. — ARTICLE XVI. Section 4. Applications for charters shall be made to the International Secretary-Treasurer, upon such forms and containing such information as the International officers shall prescribe. Such applications must specify the class of work to be performed by said Local and must be signed by at least ten (10) workers of good moral character in a locality where a sufficient number of persons to maintain a Local Union are employed. Applications must be accompanied by a charter fee of [redacted] and one month's per capita tax for each worker. $100.00

The International Secretary-Treasurer shall notify any adjoining Local or Locals and the Local District Council of such applica-

Plaintiff's Exhibit 5

(Letter dated May 6, 1981 from Benny Holland Jr.)

(Letterhead of South Atlantic and Gulf Coast District,
International Longshoremen's Association, AFL-CIO)

May 6, 1981

Mr. Ben Trione
P. O. Box 121
Montrose, Alabama 36559

Dear Ben:

As per your request, enclosed you will find charter application, pledge cards which certain individuals signed authorizing the ILA as their bargaining agent, together with check number 504 in the amount of $118.50, signed by James H. Baker III which was for charter, seal and per capita tax to the District and the International for 1 month.

We are sorry it was not possible for your group to become affiliated with the South Atlantic and Gulf Coast District ILA, and we wish you well in your new endeavor.

Sincerely,

/s/ Benny Holland, Jr.
Benny Holland, Jr., District
Secretary Treasurer

BH/em
opeiu #27,
afl-cio

encl.

cc: District President J. H. Raspberry

Plaintiff's Exhibit 6

(Pledge Card signed by J.W. Johnson)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFFILIATED WITH THE A.F.L.-C.I.O.

TO WHOM IT MAY CONCERN:

I hereby designate the International Longshoremen's Association to represent me for the purpose of collective bargaining and in any and all other situations that may arise under the operation of the National Labor Relations Act, and/or with any individual employer where the provisions of the National Labor Relations Act are not invoked.

I do further repudiate any previous authorization that may have been signed by me.

Witness: _____

Name J W. JOHNSON

Street 17 WEDGEWOOD DR

City or Town SEMMES

State ALA. Date 4-12-71

Plaintiff's Exhibit 7

(Pledge Card Signed by Satch Baker)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,

AFFILIATED WITH THE A.F.L.-C.I.O.

TO WHOM IT MAY CONCERN:

I hereby designate the International Longshoremen's Association to represent me for the purpose of collective bargaining and in any and all other situations that may arise under the operation of the National Labor Relations Act and/or with any individual employer where the provisions of the National Labor Relations Act are not invoked.

I do further repudiate any previous authorization that may have been signed by me.

Witness: _____

Name SATCH BAKER

Street 7865 EASTERWOOD WAY

City or Town OAKLAND

State CALIFORNIA Date 4-15-71

C-7

Plaintiff's Exhibit 8

(Check signed by J.H. Baker for ILA Charter Application)

JAMES H. BAKER, III
2571 A PATHWAYS
AL D/L 3981292
MOBILE, AL 36606

504

APRIL 12 19 81

61-29
551

PAY TO THE ORDER OF Benny Holland Jr. Sec Treas DLA 118 5/100

One Hundred Eighteen and 5/100 DOLLARS

The Merchants National Bank
OF MOBILE
MOBILE, ALABAMA 36622

FOR CHARTER

James H. Baker, III

⑆065100291⑆ 21 630 90⑈ 0504

Plaintiff's Exhibit 11

(Pledge Card signed by Larry Davis)

PLEDGE CARD

I, the undersigned, employee of Ryan-Walsh Stevedoring ....., employed as Stevedore .....

hereby authorize International Longshoremen's Association, AFL-CIO, to represent me for the purposes of collective bargaining, respecting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law.

NAME: Larry J. Davis

Home Address: 6 Caisson Trace Spanish Ft Ala

Phone: 626-3745 Soc. Sec. No. 417-60-5040

Date: August 9, 1981

Local: ..... 14 Employee's Signature

Plaintiff's Exhibit 12

(1980 Income Tax Return of Larry Davis)

41a

Form **1040** Department of the Treasury—Internal Revenue Service **U.S. Individual Income Tax Return** **1980**

For Privacy Act Notice, see Instructions | For the year January 1–December 31, 1980, or other tax year beginning , 1980, ending , 19

Use IRS label. Otherwise, please print or type.	Your first name and initial (if joint return, also give spouse's name and initial)	Last name	Your social security number
	Present home address (Number and street, including apartment number, or rural route)		Spouse's social security no.
	City, town or post office, State and ZIP code		Your occupation ▶ / Spouse's occupation ▶

Presidential Election Campaign Fund — Do you want $1 to go to this fund? . . . . . ___ Yes / ___ No

If joint return, does your spouse want $1 to go to this fund? . . . ___ Yes / ___ No

Note: Checking "Yes" will not increase your tax or reduce your refund.

Requested by Census Bureau for Revenue Sharing

A Where do you live (actual location of residence)? (See page 2 of Instructions.) State / City, village, borough, etc

B Do you live within the legal limits of a city, village, etc.? ☐ Yes ☒ No

C In what county do you live?

D In what township do you live?

Filing Status (Check only one box.)

1 ___ Single

2 X Married filing joint return (even if only one had income)

3 ___ Married filing separate return. Enter spouse's social security no. above and full name here ▶

4 ___ Head of household. (See page 6 of Instructions.) If qualifying person is your unmarried child, enter child's name ▶

5 ___ Qualifying widow(er) with dependent child (Year spouse died ▶ 19). (See page 6 of Instructions.)

For IRS use only

Exemptions (Always check the box labeled Yourself. Check other boxes if they apply.)

6a ___ Yourself ___ 65 or over ___ Blind

b ___ Spouse ___ 65 or over ___ Blind

Enter number of boxes checked on 6a and b ▶

c First names of your dependent children who lived with you ▶

Enter number of children listed on 6c ▶ 1

d Other dependents: (1) Name	(2) Relationship	(3) Number of months lived in your home	(4) Did dependent have income of $1,000 or more?	(5) Did you provide more than one-half of dependent's support?

Enter number of other dependents ▶

Add numbers entered in boxes above ▶ 1

7 Total number of exemptions claimed . . . . . .

Income (Please attach Copy B of your Forms W-2 here. If you do not have a W-2, see page 5 of Instructions.)

8	Wages, salaries, tips, etc. 20,435.00	8	20,435 00
9	Interest income (attach Schedule B if over $400)	9	214 67
10a	Dividends (attach Schedule B if over $400) . . . . . , 10b Exclusion		
c	Subtract line 10b from line 10a	10c	
11	Refunds of State and local income taxes (do not enter an amount unless you deducted those taxes in an earlier year—see page 9 of Instructions)	11	
12	Alimony received	12	
13	Business income or (loss) (attach Schedule C)	13	
14	Capital gain or (loss) (attach Schedule D)	14	
15	40% of capital gain distributions not reported on line 14 (See page 9 of Instructions)	15	
16	Supplemental gains or (losses) (attach Form 4797)	16	
17	Fully taxable pensions and annuities not reported on line 18	17	
18	Pensions, annuities, rents, royalties, partnerships, etc. (attach Schedule E)	18	
19	Farm income or (loss) (attach Schedule F)	19	
20a	Unemployment compensation (insurance). Total received		
b	Taxable amount, if any, from worksheet on page 10 of Instructions	20b	
21	Other income (state nature and source—see page 10 of Instructions) ▶	21	
22	Total income. Add amounts in column for lines 8 through 21 . . . . . ▶	22	21069 67

Please attach check or money order here.

Adjustments to Income (See Instructions on page 10)

23	Moving expense (attach Form 3903 or 3903F)	23		
24	Employee business expenses (attach Form 2106) . .	24		
25	Payments to an IRA (enter code from page 10) .	25		
26	Payments to a Keogh (H.R. 10) retirement plan . . .	26		
27	Interest penalty on early withdrawal of savings . . .	27		
28	Alimony paid	28		
29	Disability income exclusion (attach Form 2440) . . .	29		
30	Total adjustments. Add lines 23 through 29 . . . . . ▶	30		

Adjusted Gross Income

31	Adjusted gross income. Subtract line 30 from line 22. If this line is less than $10,000, see "Earned Income Credit" (line 57) on pages 13 and 14 of Instructions. If you want IRS to figure your tax, see page 3 of Instructions . . . . ▶	31	21069 67

Form 1040 (1980) Page 2

Tax Computation (See Instructions on page 11)

32	Amount from line 31 (adjusted gross income)	32	21069	67
33	If you do not itemize deductions, enter zero If you itemize, complete Schedule A (Form 1040) and enter the amount from Schedule A, line 41	33	20	42
	Caution: If you have unearned income and can be claimed as a dependent on your parent's return, check here ▶ ☐ and see page 11 of the Instructions. Also see page 11 of the Instructions if: • *You are married filing a separate return and your spouse itemizes deductions, OR* • *You file Form 4563, OR* • *You are a dual-status alien*			
34	Subtract line 33 from line 32. Use the amount on line 34 to find your tax from the Tax Tables, or to figure your tax on Schedule TC, Part I Use Schedule TC, Part I, and the Tax Rate Schedules ONLY if: • *Line 34 is more than $20,000 ($40,000 if you checked Filing Status Box 2 or 5), OR* • *You have more exemptions than are shown in the Tax Table for your filing status, OR* • *You use Schedule G or Form 4726 to figure your tax.* Otherwise, you MUST use the Tax Tables to find your tax.	34	21[illegible]9	19
35	Tax. Enter tax here and check if from ☑ Tax Tables or ☐ Schedule TC	35		
36	Additional taxes. (See page 12 of Instructions.) Enter here and check if from ☐ Form 4970, ☐ Form 4972, ☐ Form 5544, ☐ Form 5405, or ☐ Section 72(m)(5) penalty tax	36		
37	**Total.** Add lines 35 and 36 ▶	37	22[illegible]	

Credits (See Instructions on page 12)

38	Credit for contributions to candidates for public office	38			
39	Credit for the elderly (attach Schedules R&RP)	39			
40	Credit for child and dependent care expenses (attach Form 2441)	40			
41	Investment credit (attach Form 3468)	41			
42	Foreign tax credit (attach Form 1116)	42			
43	Work incentive (WIN) credit (attach Form 4874)	43			
44	Jobs credit (attach Form 5884)	44			
45	Residential energy credits (attach Form 5695)	45	[illegible]		
46	**Total credits.** Add lines 38 through 45	46	[illegible]	[illegible]	
47	**Balance.** Subtract line 46 from line 37 and enter difference (but not less than zero) ▶	47	2193	00	

Other Taxes (Including Advance EIC Payments)

48	Self-employment tax (attach Schedule SE)	48		
49a	Minimum tax. Attach Form 4625 and check here ▶ ☐	49a		
49b	Alternative minimum tax. Attach Form 6251 and check here ▶ ☐	49b		
50	Tax from recomputing prior-year investment credit (attach Form 4255)	50		
51a	Social security (FICA) tax on tip income not reported to employer (attach Form 4137)	51a		
51b	Uncollected employee FICA and RRTA tax on tips (from Form W-2)	51b		
52	Tax on an IRA (attach Form 5329)	52		
53	Advance earned income credit (EIC) payments received (from Form W-2)	53		
54	**Balance.** Add lines 47 through 53 ▶	54		

Payments Attach Forms W-2, W-2G, and W-2P to front.

55	Total Federal income tax withheld	55	3074	34	
56	1980 estimated tax payments and amount applied from 1979 return	56			
57	Earned income credit. If line 32 is under $10,000, see pages 13 and 14 of Instructions	57			
58	Amount paid with Form 4868	58			
59	Excess FICA and RRTA tax withheld (two or more employers)	59			
60	Credit for Federal tax on special fuels and oils (attach Form 4136 or 4136-T)	60			
61	Regulated Investment Company credit (attach Form 2439)	61			
62	**Total.** Add lines 55 through 61 ▶	62	3074	34	

Refund or Balance Due

63	If line 62 is larger than line 54, enter amount **OVERPAID** ▶	63	881	34
64	Amount of line 63 to be **REFUNDED TO YOU** ▶	64		
65	Amount of line 63 to be applied to your 1981 estimated tax ▶ 65			
66	If line 54 is larger than line 62, enter **BALANCE DUE.** Attach check or money order for full amount payable to "Internal Revenue Service." Write your social security number on check or money order ▶ (Check ▶ ☐ if Form 2210 (2210F) is attached. See page 15 of Instructions.) ▶ $	66		

Please Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

▶ Your signature Date ▶ Spouse's signature (if filing jointly, BOTH must sign even if only one had income)

Paid Preparer's Use Only

Preparer's signature and date ▶ | Check if self-employed ▶ ☐ | Preparer's social security no.

Firm's name (or yours, if self-employed) and address ▶ | E.I. No. ▶ | ZIP code ▶

Schedules A&B—Itemized Deductions AND Interest and Dividend Income

(Form 1040)

Department of the Treasury
Internal Revenue Service

▶ Attach to Form 1040. ▶ See Instructions for Schedules A and B (Form 1040).

1980
08

Name(s) as shown on Form 1040 | Your social security number

Schedule A—Itemized Deductions (Schedule B is on back)

Medical and Dental Expenses (not paid or reimbursed by insurance or otherwise) (See page 16 of Instructions.)

1 One-half (but not more than $150) of insurance premiums you paid for medical care. (Be sure to include in line 10 below.) ▶		1
2 Medicine and drugs		
3 Enter 1% of Form 1040, line 31		
4 Subtract line 3 from line 2. If line 3 is more than line 2, enter zero		
5 Balance of insurance premiums for medical care not entered on line 1		
6 Other medical and dental expenses:		
a Doctors, dentists, nurses, etc.	668	52
b Hospitals	668	99
c Other (itemize—include hearing aids, dentures, eyeglasses, transportation, etc.) ▶	155	80
7 Total (add lines 4 through 6c)	823	00
8 Enter 3% of Form 1040, line 31	632	09
9 Subtract line 8 from line 7. If line 8 is more than line 7, enter zero		
10 Total medical and dental expenses (add lines 1 and 9). Enter here and on line 33 ▶	190	91

Taxes (See page 17 of Instructions.)
Note: Gasoline taxes are no longer deductible.

11 State and local income		
12 Real estate		
13 General sales (see sales tax tables)		
14 Personal property	72	52
15 Other (itemize) ▶		
16 Total taxes (add lines 11 through 15). Enter here and on line 34 ▶	1	1

Interest Expense (See page 17 of Instructions.)

17 Home mortgage	2219	32
18 Credit and charge cards		
19 Other (itemize) ▶		
20 Total interest expense (add lines 17 through 19). Enter here and on line 35 ▶		

Contributions (See page 17 of Instructions.)

21 a Cash contributions for which you have receipts or cancelled checks		
b Other cash contributions (show to whom you gave and how much you gave) ▶		
22 Other than cash (see page 17 of Instructions for required statement)		
23 Carryover from prior years		
24 Total contributions (add lines 21a through 23). Enter here and on line 36 ▶		

Casualty or Theft Loss(es) (See page 18 of Instructions.)

25 Loss before insurance reimbursement		
26 Insurance reimbursement		
27 Subtract line 26 from line 25. If line 26 is more than line 25, enter zero		
28 Enter $100 or amount from line 27, whichever is smaller		
29 Total casualty or theft loss(es) (subtract line 28 from line 27). Enter here and on line 37 ▶		

Miscellaneous Deductions (See page 18 of Instructions.)

30 Union dues		
31 Other (itemize) ▶		
32 Total miscellaneous deductions (add lines 30 and 31). Enter here and on line 38 ▶		

Summary of Itemized Deductions (See page 19 of Instructions.) **A**

33 Total medical and dental—from line 10	190	91
34 Total taxes—from line 16	91	1
35 Total interest—from line 20	2219	32
36 Total contributions—from line 24		
37 Total casualty or theft loss(es)—from line 29		
38 Total miscellaneous—from line 32		
39 Add lines 33 through 38	3420	78
40 If you checked Form 1040, Filing Status box: 2 or 5, enter $3,400; 1 or 4, enter $2,300; 3, enter $1,700		
41 Subtract line 40 from line 39. Enter here and on Form 1040, line 33. (If line 40 is more than line 39, see the Instructions for line 41 on page 19.) ▶	20	48

Schedules A&B (Form 1040) 1980

Schedule B—Interest and Dividend Income

Name(s) as shown on Form 1040 (Do not enter name and social security number if shown on other side)

Your social security number

Part I Interest Income

1 If you received more than $400 in interest, complete Part I and Part III. Please see page 8 of the instructions to find out what interest to report. Then answer the questions in Part III, below. If you received interest as a nominee for another, or you received or paid accrued interest on securities transferred between interest payment dates, please see page 19 of the instructions.

Name of payer	Amount

2 Total interest income. Enter here and on Form 1040, line 9 . . . . . .

Part II Dividend Income

3 If you received more than $400 in gross dividends (including capital gain distributions) and other distributions on stock, complete Part II and Part III. Please see page 9 of the instructions. Write (H), (W), or (J), for stock held by husband, wife, or jointly. Then answer the questions in Part III, below. If you received dividends as a nominee for another, please see page 19 of the instructions.

Name of payer	Amount

4 Total of line 3 . . . . . .

5 Capital gain distributions. Enter here and on line 13, Schedule D. See Note below . . .

6 Nontaxable distributions . . . . . .

7 Total (add lines 5 and 6) . . . . . .

8 Dividends before exclusion (subtract line 7 from line 4). Enter here and on Form 1040, line 10a . . . . . .

B

Note: *If you received capital gain distributions for the year and you do not need Schedule D to report any other gains or losses, do not file that schedule. Instead, enter 40% of your capital gain distributions on Form 1040, line 15.*

Part III Foreign Accounts and Foreign Trusts

If you are required to list interest in Part I or dividends in Part II, OR if you had a foreign account or were a grantor of or a transferor to a foreign trust, you must answer both questions in Part III. Please see page 19 of the instructions.

	Yes	No
A At any time during the tax year, did you have an interest in or a signature or other authority over a bank account, securities account, or other financial account in a foreign country (see page 19 of instructions)?		
B Were you the grantor of, or transferor to, a foreign trust which existed during the current tax year, whether or not you have any beneficial interest in it? If "Yes," you may have to file Forms 3520, 3520–A, or 926.		

Form **5695**
Department of the Treasury
Internal Revenue Service

Energy Credits

▶ Attach to Form 1040. ▶ See Instructions on back.

1980
34

Name(s) as shown on Form 1040 — Your social security number

Jerry T [illegible] — 417 [illegible]

Enter in the space below the address of your principal residence on which the credit is claimed if it is different from the address shown on Form 1040.

Part I Fill in your energy conservation costs (but do not include repair or maintenance costs).
If you have an energy credit carryover from a previous tax year and no energy savings costs this year, skip to Part III, line 16.

A. Answer the following question: Was your principal residence substantially completed before April 20, 1977? . . . ☑ Yes ☐ No

B. If you checked the "NO" box, you CANNOT claim an energy credit for conservation cost. Do NOT fill in lines 1 through 7 of this form.

1 Energy Conservation Items:			
a Insulation	1a	520	00
b Storm (or thermal) windows or doors	1b		
c Caulking or weatherstripping	1c		
d A furnace replacement burner that reduces the amount of fuel used	1d		
e A device for modifying flue openings to make a heating system more efficient	1e		
f An electrical or mechanical furnace ignition system that replaces a gas pilot light	1f		
g A thermostat with an automatic setback	1g		
h A meter that shows the cost of energy used	1h		
2 Total (add lines 1a through 1h)	2	520	00
3 Maximum amount	3	$2,000	00
4 Enter the total energy conservation costs for this residence from your 1978 and 1979 Form 5695, line 2	4	[illegible]	
5 Subtract line 4 from line 3 (If line 4 is more than line 3, do not complete any more of this part. You cannot claim any more energy conservation credit for this residence.)	5	[illegible]	
6 Enter the amount on line 2 or line 5, whichever is less	6	520	00
7 Enter 15% of line 6 here and include in amount on line 15 below	7	78	00

Part II Fill in your renewable energy source costs (but do not include repair or maintenance costs).
If you have an energy credit carryover from a previous tax year and no energy savings costs this year, skip to Part III, line 16.

8 Renewable Energy Source Items:			
a Solar	8a		
b Geothermal	8b		
c Wind	8c		
9 Total (add lines 8a through 8c)	9		
10 Maximum amount	10	$10,000	00
11 Enter the total renewable energy source costs for this residence from your 1978 Form 5695, line 5 and 1979 Form 5695, line 9	11		
12 Subtract line 11 from line 10 (If line 11 is more than line 10, do not complete any more of this part. You cannot claim any more renewable energy source cost credit for this residence.)	12		
13 Enter amount on line 9 or line 12, whichever is less	13		
14 Enter 40% of line 13 here and include in amount on line 15 below	14		

Part III Fill in this part to figure the limitation

15 Add line 7 and line 14. *If less than $10, enter zero*	15	78	00
16 *Enter your energy credit carryover from a previous tax year*	16		0
17 Add lines 15 and 16	17	78	00
18 Enter the amount of tax shown on Form 1040, line 37	18	2271	00
19 Add lines 38 through 44 from Form 1040 and enter the total	19	78	00
20 Subtract line 19 from line 18. If zero or less, enter zero	20	2193	00
21 Residential energy credit. Enter the amount on line 17 or line 20, whichever is less. Also, enter this amount on Form 1040, line 45	21	78	00

Defendant's Motion for a Directed Verdict at the Close of Plaintiff's Case

[R163] * * *

(Jury not present:)

The Court: Do you want to be heard before I rule?

Mr. Hewitt: Yes, sir. For the record, sir.

In support of the motion for a directed verdict, Judge, that I presented to you, I would simply like to say that I don't think at this point in time that the plaintiff has presented sufficient evidence to go forward. The evidence, as it stands right now, if there is an independent witness in this case, it's Mr. Lige Boykin, the employer's representative, the individual who fired Mr. Davis, and on Direct testimony, Direct—in respect to Direct questions from the plaintiff's attorney—keeping in mind he was subpoenaed here by the plaintiff's attorney to testify on their behalf—he testified that he fired Mr. Davis on the night in question for his attempt to unionize the Master Mates & Pilots union and for that reason alone, and [R164] that he had never seen that letter of May the 15th, didn't have it with him at the time. Judge, I think that that independent witness' testimony, standing alone, is enough to take the case away from the jury because with the allegations as it stands right now, not with Mr. Trione's case but with regard to Mr. Davis' case, he is saying that on the night in question the only association, only representation he had was that particular meeting of April 12th. Representations were that if he joined the union, signed the pledge cards with the ILA and the charter application, if anyone were to be fired or laid off as a result of signing the pledge cards with the ILA, they would get their jobs back with back pay. Taking those at face value, as you must, in a case like this at this point in time in the trial. That's not the way it came out at all, Judge. The independent witness

simply said I fired him for attempting to unionize the Master Mates & Pilots. That didn't—that letter at all—have anything to do with the ILA. I think, Judge, that that's sufficient evidence to take it away from the jury at this time.

Mr. Janecky: Judge, I would also like to add that I think that as a matter of law the events that had occurred previously that in Mr. Trione's case, if we were trying Mr. Trione's case that would be one thing. But in Mr. Davis' case, he had Mr. Trione as a forebearer. Mr. Trione was fired, he had been subject to a TRO, he had gone to court, there had been an order saying that he was not entitled to, he had crossed the picket line in response to his boss' order and he was okay at that point. In spite of that, he went ahead and tried to set up a meeting for the Master Mates & Pilots, and it is for that reason that he was fired, with the knowledge that he had regarding the status of supervisors at that point in time. I think it's a matter of law he is not entitled to go forward on a fraud as to whatever representations were made at that meeting.

The Court: Well, I don't—Ya'll didn't hear all the evidence I did, or you didn't hear it the way I did. My [R165] understanding of the evidence up to this point is that these people went to the meeting that was arranged between Mr. Trione and Mr. Holland; that at that meeting Mr. Holland represented to them that if they would sign the cards he had there and the charter application and thereby become members of his union that they would be members, that they would be entitled to the protection of the union; that, if, as a result of the union activity, they lost their jobs with there company, their employers, that the union would protect them to the fullest extent, and he didn't say, "We will just protect you," he said, "We will get your job back and we will get back pay." Now, admittedly, there is some discrepancy in the testimony, and that's easily understandable and I'm not the jury. I rule on these kind of things by what evidence is there, not by whether I believe it or whether the jury will believe it or not. That they signed the things, did it relying on Mr. Holland's representations there that, first of all, they were legally eligible to become members of the union; that if they suffered any adverse reaction from their employees as a result of joining that union, that the union would protect them to the extent—and you remember that one or two of them even testified that they said, "We will not only represent you in court, but we will close the whole damn coast from Texas to Florida down if it's necessary to protect your jobs."

Mr. Janecky: If—

The Court: Then—Now, let me finish. Then, when the court put the restraining order on them, that the instructions to go to the Master Mates & Pilots came from Mr. Holland through Mr. Trione; and that that was when they attempted—they never actually had a meeting with the Master Mates & Pilots; that he set up a place for a meeting, that the ship's captains, some of them, were there; that they waited some period of time, twenty or thirty minutes and nobody showed from the Master Mates & Pilots. Now, assuming that the jury buys that and belives that evidence, [R166] then, I don't see why they couldn't find a verdict for the plaintiff and against the defendant.

Mr. Janecky: Because the only evidence—

The Court: Now, I'm going to deny the thing. I let you be heard before I did but—

Mr. Janecky: Yes, sir. Appreciate the Court's indulgence. We have a couple more jury charges we would like to add, Judge, to the ones that we previously submitted. There is just two of them and I think they are correct statements of the law.

Defendant's Motion for a Directed Verdict at the Close of Plaintiff's Case

The Court: Do ya'll need any time before you go ahead with your case?

Mr. Hewitt: No, sir.

The Court: If you don't, we will get the jury back out and go ahead.

Bring them on in.

(Jury present:)

The Court: All right. You may go ahead.

* * * * *

Defendant's Exhibit A

(Temporary Restraining Order)

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Civil Action No. CV 81-500-122

RYAN-WALSH STEVEDORING COMPANY, INC.,
a corporation,

Plaintiff,

v.

BEN TRIONE,

Defendant.

TEMPORARY RESTRAINING ORDER

This matter coming on to be heard on the 21st day of April, 1981, on the verified complaint of the Plaintiff, on the affidavits submitted by the Plaintiff and upon the Plaintiff's application for a temporary restraining order against the Defendant, and it appearing to the Court that the Defendant is engaged in picketing of the Plaintiff's business which constitutes unlawful interference with the Plaintiff's operation of its business and unlawful interference with the contract of the Plaintiff with persons other than the Defendant; that Defendant's actions are continuing in nature and, unless restrained, are causing and still continue to cause substantial and irreparable injury to the Plaintiff for which the Plaintiff has no adequate remedy at law; that Plaintiff will suffer greater injury from the denial of a temporary restraining order than will the Defendant from its issuance; and it further appearing to the Court that

immediate, substantial and irreparable injury would result to the Plaintiff before notice could be served on the Defendant and a hearing had on the application of Plaintiff for a temporary restraining order.

Now, Therefore, it is Ordered that Defendant, and all persons acting in concert or participation with him are restrained and enjoined from:

1. In any manner interfering with or obstructing by words or actions, any person or persons working for or having contracts with the Plaintiff;

2. Interfering with the operations of the Plaintiff in any manner whatsoever;

3. Interfering with contractual relations existing between the Plaintiff and others;

4. Picketing at any place in such a manner calculated to induce or having the effect of inducing any persons or parties not to enter into contracts with the Plaintiff or not to honor or comply with any of the terms of any existing contracts with the Plaintiff.

On condition that a bond be filed by the Plaintiff herein in the amount of $5,000.00 for the payment of such costs and damages as may be suffered by any party who is found to have been wrongfully enjoined or restrained, said bond to be approved by this Court or the Clerk of the Court.

It is further Ordered that this temporary restraining order shall remain in full force and effect until 9:30 a.m. on the 28th day of April, 1981.

It is further Ordered that the Defendant appear before this Court at Room 7 of the Mobile County Courthouse, Mobile, Alabama, on the 28th day of April, 1981, at 9:30 a.m. and then and there show cause why a preliminary injunction should not issue restraining the Defendant and

any and all persons acting in concert with any of them, as set forth herein.

It is further Ordered that a copy of this order together with a copy of the Complaint and all exhibits and affidavits upon which it is issued, be immediately served upon the Defendant in any manner provided by the Alabama Rules of Civil Procedure.

This Order issued at 12:30 p.m. o'clock this 21st day of April, 1981.

/s/ (Illegible)
Circuit Judge

"A True Copy"

/s/ (Illegible)
Register, Circuit Court of
Mobile County, Alabama

Defendant's Exhibit B

(Preliminary Injunction)

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Civil Action No. CV 81-500-122

RYAN-WALSH STEVEDORING COMPANY, INC.,
a corporation,

Plaintiff,

v.

BEN TRIONE,

Defendant.

PRELIMINARY INJUNCTION

This matter came on to be heard on the 28th day of April, 1981, on the plaintiff's motion for a preliminary injunction. Having considered the plaintiff's verified complaint and the affidavits submitted in support thereof, the testimony offered by the parties, and the defendant's answer and being fully advised in the premises, the Court makes the following findings of fact conclusions of law.

FINDINGS OF FACT

1. Plaintiff Ryan-Walsh Stevedoring Company, Inc., (hereinafter "Ryan-Walsh") is an Alabama corporation engaged in the business of furnishing stevedoring services for the loading and unloading of vessels calling at the Port of Mobile.

2. Defendant Ben Trione is an individual over the age of nineteen years.

Defendant's Exhibit B—Preliminary Injunction

3. In furtherance of its business, Ryan-Walsh, for valid consideration, enters into contracts with various persons, firms, and corporations under which Ryan-Walsh agrees to provide stevedoring services for the loading and unloading of vessels in the Port of Mobile. Pursuant to those contracts, Ryan-Walsh employs longshoremen who, under the supervision of Ryan-Walsh, perform the work of loading and unloading vessels. Ryan-Walsh also employs certain maintenance and garage workers, including gearmen, garagemen, equipment operators, mechanics, and helpers, whose work is essential to the performance of Ryan-Walsh's business of loading and unloading vessels at the Port of Mobile.

4. Ryan-Walsh's longshoremen are represented for the purpose of collective bargaining by Local 1410 of the International Longshoremen's Association. Maintenance and garage workers are represented for the purpose of collective bargaining by Local 1985 of the same Union. Both Unions have entered into collective bargaining agreements with plaintiff through its collective bargaining representative, the Mobile Steamship Association, Inc., which agreements prohibit strikes during the lives of the agreements.

5. Ryan-Walsh also employs a number of persons, known as "ship superintendents" whose responsibility it is to oversee and direct the work of its employees at various work sites in the Port of Mobile. Each of these ship superintendents has authority, in the interest of Ryan-Walsh, to hire, transfer, suspend, discharge, assign, reward and discipline other employees, or has responsibility to direct them and to adjust their grievances, or to effectively recommend such action, all based on their independent judgment. Prior to the termination of his employment, defendant was employed as a ship superintendent by Ryan-Walsh and was possessed with the aforesaid authority.

Defendant's Exhibit B—Preliminary Injunction

6. Defendant, in concert with certain other persons, has engaged in a campaign to organize plaintiff's ship superintendents for purposes of collective bargaining. His employment was subsequently terminated.

7. Beginning on April 21, 1981, Defendant began picketing at the entrance to certain areas at which Ryan-Walsh conducts its lawful business activities. Defendant was engaged in said picketing for the purpose of inducing Ryan-Walsh's longshore and maintenance employees to refuse to report to work in violation of the no-strike provisions of their collective bargaining agreements. As a result of Defendant's picketing, Ryan-Walsh's employees who are members of Locals 1410 and 1985 refused to report to work and engaged in a sympathy strike in support of Defendant for so long as defendant continued his picketing.

8. The picketing by the Defendant is the result of and is conducted in furtherance of a conspiracy among Defendant and certain other persons to organize plaintiff's ship superintendents for the purpose of collective bargaining and to illegally induce employees of the Plaintiff to refuse to work pursuant to their contracts with Plaintiff and to prevent and/or interfere with the Plaintiff's performance of contracts with its customers to load and unload vessels at the Port of Mobile. Defendant's picketing constituted an interference with the contractual relations existing between Plaintiff and its employees and between Plaintiff and companies with whom Plaintiff does business.

9. The continuation of Defendant's picketing would result in substantial disruption and destruction of plaintiff's business, would irreparably injure or destroy Plaintiff's reputation and good will and would irretrievably impair Plaintiff's ability to enter into profitable arrangements with others.

Defendant's Exhibit B—Preliminary Injunction

CONCLUSIONS OF LAW

1. The Plaintiff's ship superintendents are supervisors within the meaning of section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11). The Defendant's attempt, while employed as a ship superintendent, to organize Plaintiff's ship superintendent for purposes of collective bargaining was not conduct protected by the National Labor Relations Act, either arguably or otherwise.

2. The Defendant's conduct in picketing plaintiff's business operations in furtherance of his efforts to organize the ship superintendents for the purpose of collective bargaining and for the purpose of inducing employees of Ryan-Walsh to refuse to work pursuant to their contracts with Plaintiff constitutes picketing for an unlawful purpose.

3. Defendant's picketing constitutes an unlawful interference with the contractual relations between Plaintiff and its employees and between Plaintiff and companies with whom Plaintiff does business, and further constitutes an unlawful interference with Plaintiff's right to carry on its lawful business.

4. Defendant's conduct is in furtherance of a combination, conspiracy, agreement, arrangement or understanding for the purpose of hindering, delaying or preventing Plaintiff from carrying on its lawful business, which has heretofore been entered into without just cause or legal excuse for doing so in violation of § 13-6-60, *Code of Alabama* (1975).

5. Defendant, by means of duress has prevented, or seeks to prevent, others from doing work for or furnishing materials to or contracting to do work or furnish materials to Plaintiff, who is engaged in a lawful business, and has

disturbed, interfered with, or prevented, or attempted to prevent, the peaceable exercise by Plaintiff of its lawful industries, businesses, or callings, in violation of § 25-7-9, *Code of Alabama* (1975).

6. The Plaintiff has demonstrated a substantial likelihood that it will eventually prevail on the merits.

7. Plaintiff is suffering great and irreparable damage as a result of Defendant's picketing and interference and will suffer further irreparable injury unless the requested preliminary injunction issues.

8. Plaintiff has no adequate remedy at law and unless Defendant is preliminarily enjoined, Plaintiff will continue to suffer irreparable injury which cannot adequately be compensated in money damages.

9. Greater injury would result to the Plaintiff from denial of a preliminary injunction than will be inflicted on plaintiff by granting of such relief.

10. The preliminary injunction requested by the Plaintiff would not be adverse to the public interest but, to the contrary, would further the public policy of this State against the unlawful and unjustified interference with lawful businesses and with the performance of lawful contracts.

Now, Therefore, it is Ordered that the Defendant, and all persons acting in concert or participation with him, are enjoined pending further order of this Court from:

1. In any manner interfering with or obstructing by words or actions, any person or persons working for or having contracts with the Plaintiff;

2. Interfering with the operations of the Plaintiff in any manner whatsoever;

3. Interfering with contractual relations existing between the Plaintiff and others;

4. Picketing at any place in such a manner calculated to induce or having the effect of inducing any persons or parties not to enter into contracts with the Plaintiff or not to honor or comply with any of the terms of any existing contracts with Plaintiff.

On condition that a bond be filed by the Plaintiff herein in the amount of $5,000.00 for the payment of such costs and damages as may be suffered by any party who is found to have been wrongfully enjoined said bond to be approved by this Court or the Register of the Court.

Done and Ordered this the 4th day of May, 1981.

/s/ (Illegible)
Circuit Judge

Defendant's Exhibit C

(Regional Director's Ruling Dismissing Unfair Labor Practice Charge dated May 15, 1981)

NATIONAL LABOR RELATIONS BOARD
REGION 15
Plaza Tower Building, Suite 2700
1001 Howard Avenue, New Orleans, Louisiana 70113
Telephone 504/589-6396

May 15, 1981

RE: Ryan-Walsh Stevedoring Co., Inc.
Mobile, Alabama
Case No. 15-CA-8138

Mr. Gregory B. Stein
Attorney at Law
Post Office Box 1051
Mobile, AL 36633

Dear Mr. Stein:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that further proceedings on the charge are not warranted inasmuch as the evidence disclosed that Mr. Trione was employed as a supervisor within the meaning of Section 2(11) of the Act. For this reason, Section 8(a)(3) would not be applicable to his discharge inasmuch as "supervisors" are specifically excluded from the definition of employee under the Act. Nor is there sufficient evidence to establish that Mr.

Defendant's Exhibit C—Regional Director's Ruling Dismissing Unfair Labor Practice Charge dated May 15, 1981

Trione's discharge violated Section 8(a)(1) of the Act. I am, therefore, refusing to issue a complaint in this matter.

Very truly yours,

JOSEPH G. NORTON
Acting Regional Director

CERTIFIED MAIL

cc: Frank McRight, Attorney
Post Office Box 2906
Mobile, AL 36652

Ryan-Walsh Stevedoring Co., Inc.
150 North Royal
Mobile, AL 36601

Mr. Ben Trione
East Park Plaza
7 Mark Street
Montrose, AL 36559

Defendant's Exhibit C—Regional Director's Ruling Dismissing Unfair Labor Practice Charge dated May 15, 1981

FORM NLRB-4938
(10-75)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PROCEDURE FOR FILING AN APPEAL

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action by filing an appeal with the General Counsel, addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C. 20570, and a copy with the Regional Director. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C. by the close of business on May 28, 1981. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington, and a copy of any such request should be submitted to the Regional Director.

If you file an appeal, please complete the notice forms enclosed with the attached letter and send one copy of the form to each of the other parties whose names and addresses are listed. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Defendant's Exhibit D

(Letter from J.W. Johnson)

International Longshoremans Association
1821-27 The Strand
Galveston, Texas

ATTENTION: Mr. Benny Holland

Gentlemen:

I have reconsidered my intention to become involved in the organizational drive of the International Longshoremans Association; and I am writing to tell you that I do not wish to participate in any way. Accordingly, you are advised by this letter that I am revoking the earlier authorization given to you to represent me for purpose of collective bargaining and a resignation of my membership in your union. Please confirm your receipt of this letter and return all authorizations and other documents which I have submitted.

Very truly yours,

/s/ J. W. JOHNSON

Defendant's Motion for a Directed Verdict at the Close of All the Evidence

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE

Comes now the Defendant in the above styled and numbered cause, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, and moves the Court to direct a verdict in its favor for the following reasons:

1. There is not a scintilla of evidence that the Defendant made a misrepresentation that ship superintendents could legally become members of a union.

2. Misrepresentation of a matter of law, if made, cannot constitute actionable fraud since everyone is presumed to know the law.

3. There is not a scintilla of evidence that the Defendant made any misrepresentation of facts material to this lawsuit.

Defendant's Motion for a Directed Verdict at the Close of All the Evidence

4. There is not a scintilla of evidence that the Defendant made promises of future action or, if made, made with the intention of deceiving the Plaintiffs and with no intention of fulfillment on the Defendant's part.

5. There is not a scintilla of evidence demonstrating that the Plaintiff is entitled to punitive damages in this case.

Respectfully submitted,

NETTLES, BARKER & JANECKY

BRYAN, NELSON, ALLEN,
SCHROEDER & COMPTON
Attorneys for the Defendant

By: /s/ FLOYD G. HEWITT, JR.
FLOYD G. HEWITT, JR.

Filed: 11-15-83 after both sides had rested. T.J.M.
Denied: 11-15-83. T.J.M.

Defendant's Requested Jury Charges

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE NO. 1

The Court instructs the jury to find for the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION.

Ref.
T. J. M.

Defendant's Requested Jury Charges

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE NO. 3

The Court instructs the jury that to constitute actionable fraud or deceit, there must be a concealment or misrepresentation with regard to a material fact which is then in existence and not with regard to a question of law. The Court further instructs the jury that whether or not an individual who is employed as a ship superintendent may continue to be, or may become, a member of a union is a question of law and not of fact.

Ref.
T. J. M.

Bank of Loretta v. *Bobo*, 67 So.2d 77 (1953)

Spry Funeral Homes, Inc. v. *Denton*, 363 So.2d 786 (1978)

Defendant's Requested Jury Charges

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE NO. 4

The Court instructs the jury that, as a matter of law, any individual employed as a ship superintendent may continue to be, or may become, a member of a labor organization.

Ref.
T. J. M.

§164 of the Labor-Management Act

29 U.S.C. 164

Defendant's Requested Jury Charges

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE NO. 5

The Court instructs the jury that statements of an intention or a promise to do an act in the future are not statements of existing material fact and do not create a cause of action unless it is clearly and satisfactorily shown that such intention or promise to do an act in the future was made without any intention of performing it. The Court further instructs the jury that mere failure to perform is not evidence of intent not to perform at the time the promise was made and even if you find by clear and satisfactory evidence that the Defendant told the Plaintiff, LARRY DAVIS, that it would protect him from actions taken against them by his employer because of his participation in union organization efforts, and that, if fired, he would get the Plaintiff his job back, with back pay, you may not award damages to the Plaintiff unless he has clearly and satisfactorily shown that at the time such promise as to future action was made, and relied upon by the Plaintiff,

it was made with the intention of deceiving the Plaintiff and with no intention of fulfillment by the Defendant.

Ref.
T. J. M.

Sheppard v. *Kendrick,* 181 So. 784 (Ala. 1938)

Nelson Realty Co. v. *Darling Ship of Birmingham,* 101 So. 2d 78 (Ala. 1978)

Walker v. *Woodall,* 262 So.2d 756 (Ala. 1972)

Winn-Dixie Montgomery, Inc. v. *Henderson,* 371 So.2d 899 (Ala. 1979).

§6-5-104(b)(4) Alabama Code of 1975

IN THE
CIRCUIT COURT OF MOBILE COUNTY, ALABAMA
Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE NO. 12

The Court instructs the jury that if you are reasonably satisfied from the evidence that the plaintiff, Larry Davis, was fired from his job at Ryan-Walsh because of his union organizing activities for the Masters, Mates and Pilots Union and not because of his attempted affiliation with the International Longshoremen's Association, then your verdict must be in favor of defendant International Longshoremen's Association.

Ref.
T. J. M.

Defendant's Requested Jury Charges

IN THE
CIRCUIT COURT OF MOBILE COUNTY, ALABAMA
Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE NO. 13

The Court charges the jury that if you are reasonably satisfied from the evidence that the statements made by Mr. Ben Holland on April 12, 1981, to the plaintiff and the other superintendants were simply his opinions on what the International Longshoremen's Association would attempt to do if one or more of them were fired, then such opinions are not a misrepresentation of material fact and your verdict must be in favor of the defendant.

Ref.
T J. M.

Defendant's Requested Jury Charges

IN THE
CIRCUIT COURT OF MOBILE COUNTY, ALABAMA
Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE NO. 15

The Court charges the jury that under the National Labor Relations Act there is no prohibition for any individual employed as a supervisor from becoming or remaining a member of a labor organization.

29 USCA Section 164(a)

Refused
T. J. M.

Defendant's Requested Jury Charges

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE No. 16

The Court charges the jury that it is the law in Alabama that an employee working without a contract of employment is considered an employment at will and can be discharged at any time for any cause.

Refused
T. J. M.

Defendant's Requested Jury Charges

IN THE

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-81-002314

LARRY DAVIS,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, etc.,

Defendant.

DEFENDANT'S REQUESTED JURY CHARGE No. 17

The Court instructs the jury that in this action the plaintiff seeks to recover damages he claims to have sustained as the result of the alleged fraud of the Defendant in making to the Plaintiff intentional misrepresentations of existing material fact.

The Court further instructs the jury that if you find that the evidence in this case, if any, that:

1. the Defendant, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, wilfully misrepresented that the Plaintiff, as a ship superintendent, could legally become a member of a union, that the Defendant would protect the Plaintiff from actions taken against him by his employer because of his participation in an attempt to organize a union, and that, if fired, the Defendant would get him his job back, with back pay, and
2. that these misrepresentations were both false and concerned an existing material fact, and
3. the Defendant knew these misrepresentations of fact to be false, and

Defendant's Requested Jury Charges

4. that the Defendant intended to deceive or induce the Plaintiff to act by means of these wilful misrepresentations of fact, and

5. that the Plaintiff was ignorant of the falsity of the Defendant's misrepresentations of fact, and

6. that the Plaintiff reasonably relied, with a right to do so, upon the truth of the Defendant's misrepresentations of fact, and

7. that the Plaintiff was injured as a consequence of his reliance,

then your verdict shall be for the Plaintiff.

However, if you believe that the Plaintiff has failed to prove any one of these elements, then it is your sworn duty to return a verdict for the Defendant.

Old Southern Life Ins. Co. v. *Woodall*, 348 So.2d 1377 (Ala. 1977).

Given
T. J. M.

DEFENDANT'S REQUESTED CHARGE NO. 18

The Court charges the jury that the element of fraud dealing with the reliance of the plaintiff on a misrepresentation requires a reasonable reliance on such misrepresentation. Reasonable reliance is such as a reasonably prudent person would rely under the same or similar circumstances.

Given
T. J. M.

Filed November 16, 1983

Maurice W. Castle, Jr., Clerk

Instructions to the Jury

[R256] * * *

Now, the plaintiff in this case—I want to get down to the law in this particular case. The plaintiff in this case, as I told you Monday, is claiming damages of the defendant for a legal fraud. The gist or the meat of a legal fraud is the assertion or the representation of that to be true which is in fact not true. And there are several different ways that one can be guilty of a legal fraud and, in the course of these instructions, I intend to cover all of the different ways. They involve different degrees of wrong and different kinds of damages, and that's the reason that we have the different types.

The plaintiff in his complaint alleged that the fraud practiced upon him by the defendant was that the defendant's agent, servant, or employee, acting in the line and scope of his employment as such agent, servant or employee represented to the plaintiff and to others in the plaintiff's condition—ship superintendents or ship foremen—that the plaintiff was eligible to join the union—I will say the defendant—the ILA. That's the International Longshoremen's Association, and I will probably just use ILA to keep from having to say all three of those long words. That he represented to them that they were eligible to join that organization; that they would—that the union would, if they joined, would furnish them all of the protection that the union could furnish; and that the union would, if because of their activity in joining the ILA, if they lost their jobs with their employers that the union would get their jobs back and that the union would force the employer to pay the defendants' all back salary that they lost by reason of this firing. Now, [R257] remember, this is what the plaintiff has alleged.

The defendant's answer to that complaint was that they didn't do that. And, when the defendant filed an answer denying guilt, denying that it had done the things complained of by the plaintiff, that put on the plaintiff the burden of reasonably satisfying you, each one of you in-

dividually and the twelve of you as a body, of the truth of all of the material allegations of that complaint in order for the plaintiff to be entitled to a verdict at your hands.

Now, as I told you earlier in these instructions, a misrepresentation can be committed in several different ways. And the very first one is a willful misrepresentation. The defendant has to—you have to be reasonably satisfied from the evidence in order for the plaintiff to be entitled to a verdict that before this suit was filed the defendant acting by and through its agent, Mr. Hammond—I believe is his name?

Mr. Hewitt: Holland.

The Court:—willfully misrepresented a material fact to the plaintiff with the intent to induce the plaintiff to act on that representation; that the plaintiff did, without knowledge of the falsity of the representation, act upon said willful misrepresentation to his injury. Now, those are the elements of that offense, and you can see the difference, of course, of what willful is. Willful is intentional or knowledgeable, it's doing something and being aware at the time that you do it of what you are doing and what the effects of your act might be. Now, these are the elements that the plaintiff is required to prove to your reasonable satisfaction in order for him to be entitled to a verdict at your hands against the defendant, the ILA. First of all, that before the filing of this suit, I believe it was that Sunday night, April the 12th, 1981, that the defendant made a false representation to the plaintiff and to others; that that false representation was concerning an existing material fact; that that representation was made with knowledge or belief [R258] on the part of the defendant that the representation was false; that it was made by the defendant for the purpose of inducing the plaintiff to act, that is to join his union; that the plaintiff relied on that false representa-

tion; and that he proximately suffered damages as a result of relying on that representation. Now, that's the very first thing. If you believe that, then, the plaintiff is entitled to a verdict at your hands. And, in that connection, I'm not going to discuss damages with you until I have discussed all of the material aspects of legal fraud and the different ways that one can commit a legal fraud, and I don't want any one of you, when you get back there, to talk about damages until you decide whether the plaintiff has met the burden put on him by law of reasonably satisfying you that he is entitled to a verdict against the defendant. Because, if you are not reasonably satisfied that he is entitled to a verdict, you shouldn't be concerned about damages. And I wouldn't want any one of you—and you shouldn't under your oath—to say, "Well, I'm not convinced that the plaintiff is entitled to a verdict but, if you make the damages low enough, I will go along with one." Decide, first of all, whether the plaintiff is entitled to a verdict then discuss damages, and I will get into the damage aspect of this more fully later in this charge.

The second way that a person or an organization can be guilty of legal fraud is by a reckless misrepresentation. And, if each one of you individually and the twelve of you as a body are reasonably satisfied from all of the evidence in this case that the defendant misrepresented a material fact recklessly without knowledge of the truth or falsity thereof and with the intent to induce the plaintiff to act and the plaintiff acted without knowing that that representation was false and relying on that representation, then, the defendant is guilty of a legal fraud just as though he knew it was wrong and did it. In other words, the law says that if I represent something to you as being true when I don't know whether it's true or not and I by [R259] that representation induce you to act, I made it for the purpose of getting you to act, and you without recognizing or realizing that that representation is false, that that's just as

much legal fraud as though I did it knowing it was wrong and willfully and intentionally committed the wrong. You see the difference? Just as wrong in the eyes of the law to say to a person for the purpose of inducing that person to take an action that something is true when I do not actually know that it's true and it turns out that it's false, by my representation I cause that person to act, he relying on that representation and without knowledge of the falsity acts and suffers harm as a result of the action, he has a right to recover against me just in the same manner as though I had knowingly told him a falsehood.

The third way that a legal fraud can be perpetrated is through a mistaken or an innocent misrepresentation. And if you, as a body, are reasonably satisfied from the evidence that the defendant innocently or by mistake misrepresented a material fact to the plaintiff, thereby inducing the plaintiff to take an action that he would not have taken without that misrepresentation, and relying on that misrepresentation the plaintiff acts and suffers injury thereby, then, the plaintiff is entitled to a verdict for legal fraud right on. But—and I will explain this to you—the difference, there, is in the kind of damages that the jury may consider in awarding the plaintiff if you find that the defendant misrepresented something but did it innocently or by mistake and induced the plaintiff to act at his risk and to his injury.

I don't know if, in reckless misrepresentation, that I went through the elements individually to be sure that you understand them. But, in order for the plaintiff to be entitled to a verdict at your hands against the defendant on reckless misrepresentation of facts to him, you have got to be reasonably satisfied from the evidence, first of all, that there was a reckless misrepresentation. That is one that was made without **[**R260**]** that ascertainment of the truth of the statement that would be possible and made with reckless disregard to the consequences of whether it was true or not. Second, that the reckless misrepresentation was made concerning an existing material fact. Third, that it was made by the defendant recklessly or without sufficient information therefor. Fourth, that it was made for the purpose of inducing the plaintiff to act. Fifth, that the plaintiff relied upon that and didn't know that it was false and that, as a result of his relying upon that reckless misrepresentation, he acted to his injury.

Mistaken representation and innocent misrepresentation requires the following things in order for the plaintiff to be entitled to a verdict: One, an innocent or mistaken misrepresentation; two, concerning an existing material fact; three, made by a defendant with the intent to induce the plaintiff to act; fourth, reliance by the plaintiff on that misrepresentation thereby inducing him to act and acting on it without knowing that it's false; and, finally, being damaged as a result of his act.

And, finally, you can be guilty of a legal fraud where you are in a position where another person is relying upon what you say and you suppress or fail to reveal to that person a fact that you know and that he doesn't know. And, if you do that, you are guilty of a legal fraud. And, if after considering all of this evidence you are reasonably satisfied from the evidence that the defendant concealed or withheld material facts from the plaintiff and without his knowledge of such material facts—that is the plaintiff's—the plaintiff acted to his injury, then, the defendant would be guilty of a legal fraud.

Now, the very first element—and these are the elements that you must be convinced of to find for the plaintiff and against the defendant because of a suppression of the truth or deceit—first of all, there must have been a duty on the part of Mr. Hammond (sic) at that meeting to disclose facts **[**R261**]** to the plaintiff and to others, facts which he knew and which they did not know; second, he must have concealed or failed to disclose those material facts to the plaintiff; third, it must have been done to induce the plaintiff

to act; fourth, the plaintiff, relying on the assertions of the defendant and on his failure to disclose those facts, must take action and without knowledge that was concealed from him, and his action must result in damages to himself.

Now, those are the things or one set of those that you must be reasonably satisfied from the evidence that you heard in this case are true in order for you to find a verdict for the plaintiff and against the defendant. Either that before the plaintiff acted that the plaintiff (sic) acting by and through its secretary treasurer, Mr. Hammond, willfully misrepresented a material existing fact to the plaintiff; that he did it with full knowledge that it was false; that he did it for the purpose of inducing the plaintiff to an action, to act; that the plaintiff, relying upon that misrepresentation and without knowledge of the falsity of the misrepresentation, acted and that his action proximately resulted in damages to himself. If you find all of those facts to be true, all those assertions to be true from the evidence in this case, then, the plaintiff would be entitled to a verdict at your hands.

If you do not find that there was a willful misrepresentation of facts but you are reasonably satisfied from all of the evidence that at that meeting on April the 12th, that Sunday night, that the secretary treasurer of the union recklessly misrepresented facts to the plaintiff and to others; that that reckless misrepresentation was as to an existing material fact; third, that it was made by the defendant recklessly or without sufficient information therefor; that it was made for the purpose or with the intention of inducing the plaintiff to act; that the plaintiff did act on that misrepresentation without knowledge that it was false and that his action proximately **[R262]** resulted in damages to himself, then, the plaintiff would be entitled to a verdict at your hands.

If you are not reasonably satisfied from the evidence of the existence of any one of those elements, then, you

couldn't find for the plaintiff on either one of those. But you could consider a innocent or a mistaken representation. And, as I explained to you just now, if you are convinced from the evidence or reasonably satisfied from the evidence that the defendant's agent at that meeting that Sunday night mistakenly or innocently misrepresented a material fact to the plaintiff; that he did it for the purpose of inducing the plaintiff to act; that the mistaken misrepresentation was as to a existing material fact; that the plaintiff relied on that misrepresentation and without knowing that it was wrong, was false, acted and that, as a proximate result of his action he suffered damages, then, the plaintiff would be entitled to a verdict there.

And I just finished going over the elements of deceit: The failure to reveal an existing material fact which was peculiarly—I may not have said that quite right, my tongue gets twisted—peculiarly in the knowledge of the defendant and not within the knowledge of the plaintiff. And, first of all, as I told you, the elements of that offense are a duty on the part of the defendant to disclose the facts to the plaintiff. Did the defendant, acting by and through its secretary treasurer, had he put himself in the position where the plaintiff and others had a right to rely on the things that he told them concerning the activities that they were there about? Did he fail to disclose to them or did he conceal material existing facts which he knew and which they did not know and which he had reason to believe they did not know? Did he do that for the purpose of inducing the plaintiff to act? And did the plaintiff, without that knowledge, act and act to his injury?

Now, I will discuss damages with you. Damages in the law are two types. They are compensatory and punitive. **[R263]** Now, compensatory damages are damages which the law says may be allowed to a wronged or to a injured party to compensate him for all the damages that he suf-

APPELLANT'S

BRIEF

No. 85-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Appellant,

v.

LARRY DAVIS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

BRIEF FOR APPELLANT

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Questions Presented

1. Does the doctrine of federal preemption, as applied to national labor law in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), deprive a state court of subject matter jurisdiction, so that the defense of federal preemption cannot be waived?

2. Is a state preempted by §7 of the Labor-Management Relations Act, 29 U.S.C. §157, from applying its law of misrepresentation to a union's organizational activity directed towards individuals who are arguably employees, rather than supervisors?

3. Where there has been no determination by the National Labor Relations Board but only a refusal by a Regional Director to issue a complaint, based upon his finding that the charging party is a supervisor rather than an employee, has there been a clear determination as to the supervisory status of individuals other than the charging party, so that actions in state court by these individuals are not preempted?

4. Does federal labor law preempt the states from imposing no-fault liability upon unions for innocent misrepresentations in the course of organizational activity?

5. Is a jury award of excessive damages under state tort law, which goes beyond mere compensation to an injured party and discourages union organizational activities, preempted by national labor law which guarantees to the union its right to engage in those activities?

TABLE OF CONTENTS

Table of Authorities

Cases:

Statutes:

Rules:

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Opinion Below

The opinion of the Supreme Court of Alabama is reported at 470 So.2d 1215. The judgment of the Circuit Court for the County of Mobile was entered upon a jury verdict. No opinion was issued by the circuit court.

Jurisdiction

This is an action for alleged fraud and misrepresentation commenced in the Circuit Court for the County of Mobile, Alabama. A judgment in favor of plaintiff was affirmed by the Supreme Court of Alabama on May 10, 1985. A notice of appeal was filed in the Supreme Court of Alabama on May 23, 1985. The Alabama law of misrepresentation is statutory, *see* Alabama Code §6-5-101, *et seq.* (1975), and the statute, as applied in this case, has been

upheld as against a claim of preemption. Accordingly, jurisdiction of the appeal is conferred on this Court by 28 U.S.C. §1257(2).

Relevant Constitutional and Statutory Provisions

(1) U.S. Const. art. VI, §10, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

(2) Labor-Management Relations Act, §7, 29 U.S.C. §157. Rights of employees:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 U.S.C. §158(a)(3)].

(3) Labor-Management Relations Act, §8(b)(1) 29 U.S.C. §158(b)(1)

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this

> title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

(4) Alabama Code §6-5-101 (1975).

> Misrepresentation of material facts.
>
> Misrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal fraud.

Statement of the Case

Facts

Plaintiff-Appellee Larry Davis was formerly employed as a ship superintendent by the Ryan-Walsh Stevedoring Company. (R. 127)[1] Ryan-Walsh is in the business of loading and unloading ocean vessels in the port of Mobile, Alabama. (R. 29) Defendant-Appellant International Longshoremen's Association, AFL-CIO ("ILA") is a labor organization which represents longshoremen and employees in related waterfront crafts in ports from Maine to Texas and on the Great Lakes. (R. 179) ILA and Ryan-Walsh engage in collective bargaining concerning the terms and conditions of employment of longshoremen and certain other employees employed by the company.

As a regular part of its stevedoring operations, Ryan-Walsh employs a number of ship superintendents who hire

[1] References are to the record in the Alabama Supreme Court which is cited as (R.), or to the Joint Appendix which is cited as (J.A.).

the longshoremen and also direct their work on the pier. (R. 29)[2] While the ship superintendents function as the immediate superiors of the longshoremen, their compensation is often inferior. (R. 34-35) To obtain higher wages and better working conditions, the ship superintendents decided to form their own labor union and to seek affiliation with the ILA. (R. 29, 34, 115)[3]

In March, 1981, one of the superintendents, Ben Trione, contacted the ILA office in Houston, inquired as to the procedure for obtaining an ILA charter, (R. 33), and requested a copy of the ILA's walking foremen's agreement. (R. 168)[4] Benny Holland, an ILA official in Houston, discussed the possibility of organizing the superintendents with Trione, but advised him that there would be certain "legal problems." (R. 30)[5] Nevertheless, Trione and Appellee Davis arranged an organizational meeting of the superintendents and asked Holland to attend. (R. 32-33, 171)

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[2] Because it cannot be predicted how many, if indeed any, ships will be in port on a particular day, the labor requirements of a stevedore vary from day to day. (R. 35) Thus, the historical practice has been for the superintendents to hire the longshoremen on a daily basis.

[3] Under §14 of the Labor-Management Relations Act, the ship superintendents are permitted to become and remain members of a labor organization, regardless of whether they are "supervisors" within the meaning of the Act. 29 U.S.C. §164.

[4] In Houston, the longshoremen are directed by walking foremen, who perform a job function similar to that of the ship superintendents in Mobile. (R. 119) The walking foremen belong to an ILA local and are covered by a collective bargaining agreement. (R. 169)

[5] Under §14 of the Labor-Management Relations Act, supervisors are not considered to be "employees" within the meaning of the LMRA. 29 U.S.C. §164. Thus, although the superintendents were entitled to join the union, if they were eventually determined by the National Labor Relations Board (NLRB) to be "supervisors," Ryan-Walsh would be free to fire them for their union activity.

Approximately twenty superintendents attended the organizational meeting. (R. 34) Although they desired union representation, many of the men were reluctant to sign pledge cards for fear of reprisal by the employer. (R. 195) In an attempt to reassure the men, Trione asked Holland to explain what action the union could take if the men were discharged for union activities. (R. 35-36) Appellee claims that Holland told the men that the ILA could get them their jobs back with back pay, if they were fired for union activities. (R. 36) Holland, on the other hand, testified that he told the men that he did not know whether they were supervisors, but that, if they were supervisors, "they would not be covered under the Act." (R. 228) In any event, several of the superintendents, although less than a majority of those present, signed pledge cards after listening to Holland's statement. (R. 230) At the conclusion of the meeting, appellee and Trione collected the pledge cards and kept them so that they would be able to submit them to the NLRB when they had the required number of signatures. (R. 215, 231)[6] However, a sufficient number of cards was never obtained, and no representation petition was ever filed.

The next day, Monday, April 13, Trione (but not Davis) was fired by Ryan-Walsh for his union activities. (R. 39) Trione immediately contacted the ILA, which retained an attorney for him. (R. 40)[7] The attorney filed an unfair labor practice charge against Ryan-Walsh with the NLRB. (J.A. 10a) The charge alleged that Trione was an em-

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[6] Under §9 of the LMRA, the NLRB may not certify a union to act as collective bargaining representative unless it has the support of the majority of the employees in the unit. 29 U.S.C. §159.

[7] Holland also suggested that Trione establish a picket line to protest his (presumably illegal) discharge. (R. 39) In response to Trione's picketing, Ryan-Walsh obtained a temporary restraining order in the Mobile County Circuit Court on April 21. (J.A. 53a) The restraining order was followed by a preliminary injunction against Trione's picketing or other interference with Ryan-Walsh's operations on May 4. (J.A. 56a)

ployee under the Act, and that by firing him for union activities the employer had violated §8(a)(1) and §8(a)(3) of the LMRA. (J.A. 10a) On May 15 the NLRB's Regional Director declined to issue a complaint, ruling that Trione was a "supervisor" and that there was insufficient evidence that the employer had violated the Act. (J.A 62a) No appeal was ever taken by Trione from the dismissal of his charge by the Regional Director.[8]

On or about May 18, Ryan-Walsh learned that, despite the outstanding injunction against Trione and the unfavorable ruling from the Regional Director, appellee was persisting in his efforts to organize the ship superintendents. (R. 105) As a result, Ryan-Walsh discharged Davis on May 18. (R. 105)[9] Although unemployed for three months, (R. 137), Davis eventually found work as a manager for an engineering supply company. (R. 139)[10]

Proceedings in the Alabama Courts

This action for alleged fraud and misrepresentation was filed on October 5, 1981, in the Circuit Court for Mobile County Alabama. (J.A. 1a) Although the complaint alleges scienter, (J.A. 12a), and thus states a claim only for intentional misrepresentation, the trial court instructed the jury that they could find the ILA liable for a reckless or even an "innocent misrepresentation." (J.A. 82a) The jury

[8] The Rules and Regulations of the NLRB provide for an appeal to the NLRB's general counsel from the Regional Director's refusal to issue a complaint. *See* 102.19 NLRB Rules and Regulations and Statements of Procedure, Series 8 as amended. *See also* 29 U.S.C. §153(d).

[9] Davis never contacted the ILA to request that they take any action on his behalf relative to the discharge. (R. 156) Except for Davis and Trione, none of the superintendents who signed ILA pledge cards or attended the meeting of April 12 was fired by the employer. (R. 73, 82, 94, 107, 115)

[10] Davis' 1980 income at Ryan-Walsh was $20,435.00. (J.A. 41a) At the time of trial, his estimated annual earnings with the engineering company were $19,500.00. (R. 139)

returned a general verdict in favor of plaintiff in the amount of $75,000.00. (R. 273)[11]

In its motion to the trial court for a judgment notwithstanding the verdict (j.n.o.v.), the ILA raised its defense of federal preemption. (J.A. 96a) The trial court denied the motion for a j.n.o.v., and judgment was entered on the verdict. (J.A. 5a)

In affirming the judgment in all respects, the Alabama Supreme Court took the view that the threshold issue was whether federal preemption is a waivable defense. 470 So. 2d at 1216. The court held that federal preemption, as an "affirmative defense," is waivable and must be affirmatively pleaded in order to avoid waiver. *Id.* In a footnote to its opinion, the court indicated that, were it to rule on the merits, it would not find "that the state court's jurisdiction is federally preempted." *Id.* at n.2. The court did not expressly address ILA's alternative arguments that the submission of the federally-preempted innocent misrepresentation theory required a new trial or that the excessive award of damages was inconsistent with federal labor law.

Since the Alabama law of misrepresentation is statutory, *see* Ala. Code §6-5-101, and the statute, as applied, had been upheld against a claim of preemption, ILA appealed as of right to this Court. 28 U.S.C. §1257(2). By order entered October 15, 1985, the Court noted probable jurisdiction and directed briefing upon the merits.

[11] The jury's verdict cannot be taken as a finding that a representation as to "getting the men their jobs back" was ever made. Davis also alleged that the union falsely represented that the superintendents could legally become members of the union. (J.A. 12a) After denying appellant's request to charge that supervisors are permitted to become members of a labor organization under 29 U.S.C. §164, (J.A. 70a; 75a), the trial court submitted to the jury the question of whether a representation concerning the superintendents' eligibility to join the union was made. (J.A. 79a) Thus, the jury could have imposed liability simply upon a finding that the ILA told Davis that he was eligible to join the union.

Summary of Argument

The defense of federal preemption as enunciated by this Court in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959) cannot be waived. If federal labor law arguably covers a particular activity, state courts are divested of subject matter jurisdiction to regulate that activity. Since state courts are under a responsibility, *sua sponte,* to inquire into the question of their own subject matter jurisdiction, they should on their own initiative raise the issue of federal preemption.

The Alabama state courts are preempted from applying their law of misrepresentation to the union's appeal for membership in this case. Absent a clear determination as to the status of the superintendents, the ILA's appeal for union membership was arguably protected by §7 of the Labor-Management Relations Act, 29 U.S.C. §157. The question of whether the superintendents are employees or supervisors might have been presented to the National Labor Relations Board in either a representation or an unfair labor practice proceeding. The finding by the Regional Director that Trione is a supervisor is not a clear determination as to Trione's status, let alone that of the other members of the unit. Absent a clear determination as to supervisory status by the NLRB, the superintendents are arguably employees.

The imposition of strict liability without fault for a misrepresentation, occurring in the course of union organizational activity, is preempted by federal law. Imposition of liability without fault will discourage unions from engaging in federally protected organizational activity. The jury's verdict was excessive in light of the actual damages proved and thus is inconsistent with federal labor law.

POINT I

The Defense of Federal Preemption Cannot Be Waived

The Alabama Supreme Court viewed the threshold issue in this case as "whether federal preemption is a waivable defense." 470 So.2d at 1216. While the court recognized that preemption is not listed as an "affirmative defense" under Alabama's Rules of Civil Procedure, *see* Ala. R. Civ. P. 8(c), the court nonetheless held that the defense must be affirmatively pleaded to avoid waiver. *Id.*

In ruling that the defense of federal preemption is waivable, the Alabama Supreme Court is in direct conflict with numerous decisions of this Court which hold that Congress deprived the states of subject matter jurisdiction to regulate conduct arguably covered by the Labor-Management Relations Act. In the landmark case of *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959), the Court noted that in enacting the LMRA, "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal [the National Labor Relations Board]. . . ." *Id.* at 241. Since "a multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law," *Id.* at 243, the Court concluded that Congress intended to divest state courts of jurisdiction rather than risk potential interference with national labor policy.

In *Garmon* the Court also articulated the general guidelines for determining those areas of activity as to which the states are deprived of jurisdiction.

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are pro-

> tected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that *state jurisdiction* must yield.

359 U.S. at 244. (emphasis supplied.)

* * * * *

> When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

359 U.S. at 245.

The Court went on to note specifically that, if activity is arguably covered by the Act, the states are deprived of jurisdiction to apply their tort law to regulate the activity.

> Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Id. at 247.

Subsequent decisions of this Court, while refining the *Garmon* formulation, have reaffirmed the proposition that the question of whether a particular state claim is preempted goes to the subject matter jurisdiction of the state court. *See, Local 100, United Association of Journeymen* v. *Borden*, 373 U.S. 690, 691 (1963) ("the permissible scope of state jurisdiction in the field of labor relations"); *Local 207, Iron Workers* v. *Perko*, 373 U.S. 701, 708 (1963) ("the State must yield jurisdiction"); *Linn* v. *United Plant Guard*

Workers, 383 U.S. 53, 55 (1966) ("the court does have jurisdiction to apply state remedies"); *Farmer* v. *United Bhd. of Carpenters*, 430 U.S. 290, 305 (1977) ("we cannot conclude that Congress intended to oust state court jurisdiction"); *Sears, Roebuck & Co.* v. *United Bhd. of Carpenters*, 436 U.S. 180, 188 (1978) ("jurisdictional bar"); *Local 926, Operating Engineers* v. *Jones*, 460 U.S. 669, 676 (1983) ("Congress intended to deprive the State of the power to act"); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 511 (1983) ("an obligation that the State could not negate").[12]

Since a claim of federal preemption is addressed to the subject matter jurisdiction of the state court, the defense is never waived and may be raised for the first time on appeal.[13] Until this case, the states appeared to be unanimous in allowing the defense of preemption to be asserted on appeal, even when it had not been raised in the trial court. *See, Consolidated Theatres, Inc.* v. *Theatrical Stage Employees, Local 16*, 69 Cal.2d 713, 73 Cal. Rptr. 213, 447 P.2d 325, 331 (1968) (Labor-Management Relations Act); *Chicago and North Western Railway Co.* v. *La Follette*, 27 Wis.2d 505, 135 N.W.2d 269, 273 (1965) (Railway Labor Act); *General Building Contractors Association* v. *Local 542*, 370 Pa. 73, 87 A.2d 250, 253 (1952) (Norris-La Guardia).

Nevertheless, the Alabama Supreme Court chose to depart from this rule based on "public policy" considerations.

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[12] *See also, Vaca* v. *Sipes*, 386 U.S. 171, 179 (1967) ("as a general rule, neither state nor federal courts have jurisdiction over suits directly involving activity which is arguably subject to §7 or §8 of the Act.")

[13] In the federal courts, as well, the defense of lack of subject matter jurisdiction may be raised initially on appeal. Fed. R. Civ. P. 12(h)(3). Because "the jurisdiction of the federal courts is a grant of authority to them by Congress and thus beyond the scope of litigants to confer," *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167 (1939), subject matter jurisdiction can never be waived. *See also, Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692 (D.C. Cir. 1974).

470 So.2d at 1217. The court ruled that in order to promote judicial economy, it could not allow the union "two bites at the same apple," *Id.* at 1217-18, i.e., a trial on the "merits" of the misrepresentation claim and a post-judgment attack on subject matter jurisdiction. *Id.* at 1218. However, a state court is under a duty to notice on its own motion a failure of subject matter jurisdiction. This is the procedure in Alabama and in apparently all of the states.[14] Thus, the state court is also under a duty to recognize on its own initiative the issue of federal preemption, if that defense is properly presented by the facts of the case. The Alabama Supreme Court's concern that the trial judge's "ruling with respect to preemption was never invoked," 470 So.2d at 1217-18, is beside the point. Although it clearly would have been preferable for trial counsel to alert the court to the issue, the court on its own initiative should have inquired into the possibility of preemption.[15]

As a practical matter, imposing on state courts the obligation to recognize the possibility of federal preemption on their own will result in little, if any, waste of "trial time" or judicial resources. State trial judges should easily be able to recognize those cases in which there is a pos-

[14] *See, e.g.*, Ala. R. Civ. P. 12(h)(3); Ariz. R. Civ. P. 12(i)(3); Ark. R. Civ. P. 12(h)(3); Ga Code 9-11-12(h)(3); Idaho R. Civ. P. 12(h)(3); Mass. R. Civ. 12(h)(3); Vt. R. Civ. P. 12(h)(3). It also applies in the federal courts. Fed. R. Civ. P. 12(h)(3); *Potomac Passengers Ass'n* v. *Chesapeake & Ohio Ry. Co.*, 520 F.2d 91 (D.C. Cir. 1975).

[15] The Alabama Court's similar concern that it was "grossly unfair" to the trial judge not to invoke his ruling, *Id.* at 1217, is similarly misplaced. The trial court could have raised the issue of preemption on its own motion prior to the trial. Moreover, the trial judge's ruling with respect to preemption was indeed invoked on the motion for a j.n.o.v.

The Alabama Supreme Court's further suggestion that the union's failure to raise the defense of preemption prior to trial was "deliberate," *Id.* at 1218, has no basis in the record. There is no reason to assume that a union would intentionally fail to raise a complete defense in an action where plaintiff is seeking damages of $500,000.00. (J.A. 12a)

sibility that the defense of federal preemption may apply.[16] Indeed, in any case where the defendant is a labor organization, it should be apparent that the defendant's activity might arguably be subject to the Labor-Management Relations Act.

The issue of federal preemption by its nature requires a delicate balancing of the interests of our state and federal governments. However, imposing an obligation on state trial courts to recognize the issue of federal preemption on their own initiative works no interference with the operation of state law. State trial courts, under their own procedures, must be alert to limitations upon their jurisdiction. In these circumstances, it was clear error for the Alabama Supreme Court to conclude that the defense of federal preemption had been waived in this case.

POINT II

Alabama Is Preempted From Applying Its Law of Misrepresentation to the ILA's Organizational Activity.

In Point I, *supra,* it was demonstrated that the defense of federal preemption cannot be waived. Proceeding to the merits of the ILA's preemption claim, it is clear that Alabama is preempted from applying its law of misrepresentation in the circumstances of this case. The ILA's appeal for union membership was arguably protected by §7 of the LMRA. Absent a clear determination by the NLRB that the ship superintendents are supervisors rather than employees, superintendents are arguably employees and the state is preempted from applying its law. Even if Alabama has a significant interest in protecting its citizens from misleading representations by labor unions so that the union's solicitations may be regulated by the state, the

[16] It should be noted that while appellant did not specifically claim preemption prior to the jury's verdict, appellant did put the court on notice that the issue of Trione's status as a supervisor had been presented to the NLRB's Regional Director. (J.A. 62a)

imposition of liability without fault is inconsistent with federal labor law.

A. *Appeals for Union Membership Are Arguably Protected by §7*

In the landmark case of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), this Court established the "general guidelines" for defining "the permissible scope of state regulation of activity touching upon labor-management relations." *Sears, Roebuck & Co.* v. *United Bhd. of Carpenters*, 436 U.S. 180, 187 (1978). The first related to activity which is clearly protected or prohibited by the federal statute.[17] As this Court noted in *Sears*, 436 U.S. at 187, the second articulated a more sweeping prophylactic rule.

> When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

359 U.S. at 245. Thus, as a general rule, states are preempted from applying their law to activity which is arguably protected by §7 or arguably prohibited by §8 of the Act.

Absent a clear determination by the NLRB that the ship superintendents are supervisors, *see* Point II B *infra*, the ILA's organizational activity, including Holland's statement encouraging the superintendents to join the union, is arguably protected by §7. Section 7 guarantees employees the right "to self-organization, to form, join or assist labor

[17] In view of the issue of the superintendents' status as supervisors or employees, *see* Point II B *infra*, appellant does not contend that a representation that "the ILA could get the superintendents their jobs back" would be clearly protected or clearly prohibited by federal law.

organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 U.S.C. §157. Absent fraud, soliciting employees to join the union is conduct protected by §7. *NLRB* v. *Standard Container Co.*, 428 F.2d 793 (5th Cir. 1970). On the other hand, a fraudulent representation made by a union to induce membership is an unfair labor practice under §8(b)(1), because it coerces employees in the exercise of their §7 rights. *NLRB* v. *Gorbea, Perez & Morrell*, 300 F.2d 886 (1st Cir. 1962).[18]

In *Sears, Roebuck & Co.* v. *United Bhd. of Carpenters*, 436 U.S. 180 (1978), this Court identified certain factors which may warrant a departure from *Garmon's* general preemption guidelines. None of these considerations is applicable in this case.

As to the arguably prohibited branch of the *Garmon* doctrine, preemption may not be appropriate if 1) there exists a significant state interest in protecting the citizen from the challenged conduct, and 2) the state court considers a separate controversy from that which would be presented to the federal forum. 436 U.S. at 196-197. Neither requirement is satisfied in this case. While Alabama may indeed have a salutory concern with protecting its citizens from misleading solicitations by labor organizations, the interest is outweighed in this case by the risk of interference with the regulatory jurisdiction of the Labor Board.

Since Davis and Trione never obtained pledge cards from a majority of the superintendents, no representation

[18] Appellant recognizes that a representation that the superintendents could not be discharged for union activities could never constitute an unfair labor practice. If the superintendents are employees, the statement is true, so there has been no misrepresentation. If the superintendents are not employees, they have no §7 rights, so the union could not coerce them in the exercise of their §7 rights.

petition was ever filed with the Board. However, had such a petition been filed, the NLRB would have been required to decide the issue of whether the superintendents were "supervisors" within the meaning of the Act. NLRB regulations require the Regional Director, in processing a representation petition, to inquire into the issue of the NLRB's jurisdiction. NLRB Case Handling Manual §11016.[19] This Court has recognized that the question of whether a particular individual is an "employee" or a "supervisor" involves "difficult problems of definition of status, problems which . . . are precisely of a kind most wisely entrusted initially to the Labor Board." *Iron Workers* v. *Perko,* 373 U.S. 701, 706 (1963).[20]

However, the identical question of whether or not the superintendents were supervisors was of necessity submitted to the Alabama jury. In order to decide whether the union misrepresented its ability to obtain reinstatement for the superintendents, the jury would of necessity have to decide whether or not the superintendents were supervisors. Thus, the state law controversy of whether the union made a misrepresentation and the federal controversy of whether the superintendents were in fact supervisors are "the same in a fundamental respect." *Operating*

[19] Although the Regional Director in refusing to issue a complaint upon Trione's unfair labor practice charge ruled that Trione was a supervisor, he made no determination as to Davis or any other member of the unit. Moreover, the Regional Director's finding is not even final as to Trione because Trione did not exhaust administrative remedies by appealing to the General Counsel, *see* Point II B *infra.*

[20] Sec. 2(11) of the LMRA defines the term "supervisor" to mean any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. §152(11).

Engineers v. *Jones,* 460 U.S. 669, 682 (1983).[21] Because the state jury was called upon to resolve the identical controversy that might have been presented to the Labor Board, the risk of potential interference with the Board's regulatory jurisdiction requires that the state court be preempted.

Even if separate controversies were presented, the submission by the trial court of a strict liability theory to the jury was inconsistent with federal labor law.[22] In *Linn* v. *United Plant Guard Workers,* 383 U.S. 53 (1966), this Court held that a state action for libel arising in the course of a labor dispute was not preempted.[23] However, "In order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy," the Court limited the availability of the state remedy, "to those instances in which the complainant can show . . . malice. . . ." *Id.* at 64-65. The Court defined "malice" as knowledge of the falsity of the statement or reckless disregard of whether the statement was true or false. *Id.* at 65. This limitation on the state cause of action was necessary "to effectuate the statutory design with respect to preemption." *Id.*

[21] Moreover, if the employer had interfered with Holland's appeal for union membership and the ILA had filed a §8(a)(1) charge, in determining whether Holland's communication was protected, the Board would be required to determine if it was misleading, the precise issue before the state court. This Court noted in *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 58 (1966) that the NLRB is also frequently called upon to determine whether statements are misleading in the context of representation proceedings.

[22] Since strict liability was not pleaded in the complaint, objection to the strict liability theory could not be raised until the time of the court's charge. In requesting a charge on scienter, (J.A. 72a, 77a, 78a), appellant adequately objected to the submission of the strict liability theory.

[23] The NLRB "looks only to the coercive or misleading nature of the statements rather than their defamatory quality." *Id.* at 63. Thus, the Court held there was no potential for interference with the Board's jurisdiction.

In the case at the bar, the jury returned a general verdict without indicating whether their finding of liability was based on the innocent misrepresentation theory. Nevertheless, the trial court instructed the jury that innocent misrepresentation carries only compensatory damages. (J.A. 87a) Appellee argues that the $75,000 verdict in this case includes punitive damages, and so the jury must have found a reckless or intentional misrepresentation. However, the record provides no support for appellee's speculation that the jury's award was punitive, rather than compensatory, in character.[24] Appellee claimed "mental pain and anguish" in the complaint and demanded judgment for $500,000 damages. (J.A. 12a)[25] Moreover, appellee argued to the jury that his lost wages continued even after he regained employment.[26] In these circumstances, there is no basis for determining whether the jury based its verdict on the innocent misrepresentation theory, and at the very least a new trial should be ordered.

As to the arguable protection branch of *Garmon*, the Court ruled in *Sears* that preemption is justified, "only in situations in which an aggrieved party has a reasonable opportunity to invoke the Board's jurisdiction himself or else to induce his adversary to do so." 436 U.S. at 201. In *Sears*, the employer could not directly obtain a Board ruling on the question of whether the union's trespassory picketing was protected. On the other hand, after Sears demanded that the union vacate its property, the union had the opportunity to file an unfair labor practice charge, raising the question of whether its picketing was protected.

[24] Since the Alabama Supreme Court ruled that federal preemption had been waived, it did not reach this issue.

[25] Since Alabama rules require that punitive damages be specifically pleaded, Ala. R. Civ. P. 9, the $500,000 damages demanded in the complaint are presumably compensatory in character.

[26] Closing argument of Mr. Biles at 8.

The Court held that "As long as the union has a fair opportunity to present the protection issue to the Labor Board, it retains meaningful protection against the risk of error in a state tribunal." *Id.* at 207.

In the present case, if the superintendents are employees, they are protected by §8(a)(1) from employer interference with their §7 rights. Had Ryan-Walsh interfered with Holland's appeal for union membership and a §8(a)(1) charge been filed, the Board in ruling upon the protected nature of Holland's appeal would have been required to determine whether it was truthful or misleading, and thus whether the superintendents were in fact supervisors or employees. However, ILA had no occasion to file such a charge in this case. The organizational activity was not conducted on the employer's property as it was in *Sears*, but rather in a public meeting hall. (R. 32) Thus, the employer had no opportunity to interfere with the ILA's appeal for union membership, and the ILA had no opportunity to present the issue of the protected nature of its conduct to the Board.

If a representation petition had been filed, the Board in resolving the question of its own jurisdiction would have been required to determine whether the ship superintendents were supervisors. However, the union did not have a reasonable opportunity to present the "supervisor" issue to the Board, because it never obtained a majority of the unit and was thus unable to file a representation petition.[27] Nevertheless, state law should still be preempted. The issue of whether a union is to be protected in its organizational activity should not turn on whether it obtains a majority status.

Thus, none of the considerations militating in favor of departure from the *Garmon* guidelines apply in this case.

[27] The record is clear that Davis and Trione retained the pledge cards at the end of the organizational meeting. (R. 215, 231) Thus, it was up to appellee, not appellant, to file a representation petition.

Preemption is appropriate, unless there has been a clear determination that the superintendents are "supervisors" rather than "employees."

B. *There Has Been No Clear Determination by the NLRB as to Whether the Ship Superintendents Are Supervisors or Employees*

In *Hanna Mining Co.* v. *MEBA,* 382 U.S. 181 (1965), this Court stated that "[A]ctivity designed to secure organization or recognition of supervisors cannot be protected by §7 of the Act, arguably or otherwise." *Id.* at 188. Moreover, the Court held that the State of Wisconsin was not preempted from restraining MEBA from picketing to force the employer to recognize a supervisors' union, even though employees had honored the picket lines, and the union arguably violated §8(b)(4).

Nevertheless, the Court recognized in *Hanna Mining* that, as to the "arguably protected" branch of the preemption claim, state law could be applied only if the supervisory status of the individuals in question "has been settled with unclouded legal significance." 382 U.S. at 190, quoting *Garmon,* 359 U.S. at 246. The Court held that, "[T]he Board's statement accompanying its refusal to order a representation election does resolve the question with the clarity necessary to avoid preemption." *Id.*

As to the "arguably prohibited" aspect of the preemption claim, the Court held that there was not even an arguable violation of §8(b)(4), based upon the findings by the Regional Director and General Counsel in declining to issue a complaint. *Id.* at 191. The Court stated that the refusal by General Counsel was "illuminated by explanations that do squarely define the nature of the activity." *Id.* at 192.[28] Citing §3(d) of the Act, 29 U.S.C. §153(d), the Court

[28] In *Garmon,* the Court had indicated in *dictum* that the "refusal of the General Counsel to file a charge . . . does not define the nature of the activity with unclouded legal significance." 359 U.S. at 245-46.

noted that "the General Counsel has statutory final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints." *Id.* Moreover, the Court held that even if a §8(b)(4) violation were present, preemption was not required since, "[T]he Board has established that the workers sought to be organized are outside the regime of the Act." *Id.* at 193.

In *Hanna Mining* the Court ruled that in the case of organizational activity directed towards supervisors, a finding by the General Counsel that no violation of the Act occurred is tantamount to a ruling that no arguable violation is present. More recently, in *Local 926, Operating Engineers* v. *Jones,* 460 U.S. 669 (1983), the Court held that an action by a supervisor against a union for interference with contractual relationships was preempted because the union arguably violated §8(b)(1) by coercing the employer in its choice of collective bargaining representative. Of particular relevance to the present case, the Court noted that the supervisor had not adequately submitted his dispute to the Board by appealing to General Counsel. *Id.* at 680.

In the case at bar, there has been no clear determination by the NLRB as to the employee or supervisory status of appellee, or indeed of any of the ship superintendents. While the NLRB's Regional Director dismissed Trione's unfair labor practice charge based on a finding that Trione was a supervisor, the Regional Director made no determination as to the status of any other individual. Since Trione never appealed to General Counsel, the dismissal by the Regional Director is not even a clear determination as to Trione's status. Trione prematurely terminated the procedures established by Congress for determining employee or supervisory status. His failure to "exhaust his administrative remedies," 460 U.S. at 680, should not provide a basis for appellee to maintain an action in state court.

No representation petition, requesting the NLRB to hold an election among the ship superintendents, was ever filed.

Had such a petition been filed, the NLRB might have determined whether the ship superintendents were supervisors or employees.[29] However, in the absence of such a clear determination by the Board, the ship superintendents are arguably employees. Thus, appeals for union membership directed at the superintendents are arguably protected by the Act, and state law is preempted.

POINT III

The Verdict Is Excessive.

In *Linn* v. *United Plant Guard Workers,* 383 U.S. 53 (1966), this Court, although recognizing that a claim for libel arising in the course of a labor dispute is not preempted, was careful to impose a duty on state trial judges to require a remittitur or new trial, if the damages awarded are excessive. *Id.* at 66. Similarly, in *Farmer* v. *United Bhd. of Carpenters,* 430 U.S. 290 (1977), the Court, although permitting a claim for intentional infliction of emotional distress, stressed the responsibility of state trial courts to assure that the damages awarded are not excessive. The reason for imposing this responsibility on state trial courts is that excessive awards of damages may endanger the financial stability of labor organizations and impair the union's ability to function as collective bargaining agent. *Cf. IBEW* v. *Foust,* 442 U.S. 42, 48 (1979). Thus, an excessive damage award for conduct occurring in the course of union organizational activity is inconsistent with national labor policy.

In the case at bar, in view of the short time period during which appellee was out of work, the jury's verdict was clearly excessive. Appellee testified that he was unem-

[29] If the Board determined that the superintendents other than Trione were employees, it might have ordered an election, although it declared Trione ineligible to vote and excluded him from the bargaining unit. 29 U.S.C. §159(b); NLRB Case Handling Manual ¶13,385; 13,124.

ployed for only three months, (R. 137) and that his annual salary with the new employer was $19,500, (R. 139), approximately what he had earned the year before with Ryan-Walsh. Appellee's lost wages, then, were only about $5,000. It cannot necessarily be inferred that the verdict includes a punitive damage award. *See* p. 18 *supra.* Although appellee also sought damages for being "embarrassed and humiliated" and suffering "great mental pain and anguish," (J.A. 12a), an award of $70,000 for these items in this case would clearly be unjustified. In these circumstances, the jury's award is clearly excessive and a remittitur should have been ordered.

CONCLUSION

For the foregoing reasons, the judgment of the Alabama Supreme Court should be reversed and the case remanded with instructions to dismiss the complaint. Alternatively, the judgment should be reversed and the case remanded for a new trial at which only the issues of intentional and reckless misrepresentation may be submitted to the jury and at which the jury shall be charged on §14 of the Labor-Management Relations Act. Alternatively, the judgment should be reversed and the case remanded with instructions to issue a remittitur.

Dated: November 27, 1985

Respectfully submitted,

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APPELLEE'S

BRIEF

(8)

No. 85-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Appellant,

v.

LARRY DAVIS,

Appellee.

On Appeal From The Supreme Court Of Alabama

BRIEF FOR APPELLEE

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48?

QUESTIONS PRESENTED

1. Will a union's tardy assertion of the defense of preemption in response to a state court tort lawsuit be a non-waivable subject matter jurisdictional challenge, even where the state court has unquestioned jurisdiction to adjudicate the claim?

2. Will a union's failure to assert a federal labor law preemption defense in a timely manner in response to a state court tort lawsuit constitute a waiver of the preemption defense?

3. Does the federal labor law bar a state from enforcing its misrepresentation law against a union, where the union was found by a jury to have committed intentional fraud against a "supervisor" not covered by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*?

4. Where a state court jury issues an award of compensatory and punitive damages against a union which has been found to have committed the intentional tort of misrepresentation, does the federal labor law bar the jury's award of punitive damages?

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

Statutes and Constitutional Provisions

TABLE OF AUTHORITIES—continued

Rules

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BRIEF FOR APPELLEE

STATEMENT OF THE CASE

I. FACTS

Larry Davis ("Davis") spent over six years of his young working life climbing his way toward the position of ship superintendent with Ryan-Walsh Stevedoring Company ("Ryan-Walsh") on the docks in Mobile, Alabama. (R. 127-129). He reached the job of ship superintendent and was so employed until May 18, 1981, when he was fired for attempting to organize a union which was to be affiliated with the International Longshoremen's Association, AFL-CIO ("ILA"). (R. 134, 136).

Ben Trione ("Trione"), a witness at the trial below and one of Davis' fellow ship superintendents at Ryan-Walsh, described a ship superintendent's job as follows:

> A. A ship superintendent is in charge of the vessel while it's in port, of the loading and unloading, he does the hiring and firing of the gangs and the people who work on the ship.
>
> Q. Okay. Did you, as a ship superintendent, have the right to tell the employees under you what to do and when to do it and how to do it?
>
> A. Yes, sir.

(R. 29).

Trione's delineation of a ship superintendent's duties is virtually the same as the definition of a supervisor set out in the National Labor Relations Act ("NLRA").[1]

When Davis became a ship superintendent, he was not satisfied with his pay rate. (R. 130). The evidence shows that many other ship superintendents were also not satisfied, so they began thinking about organizing a union. (R. 29, 35, 86, 115). Trione contacted the ILA in 1979 or 1980 and inquired about the possibility of organizing a union of ship superintendents. (R. 29). He was referred to Benny Holland ("Holland"), secretary-treasurer of the South Atlantic and Gulf Coast District of the ILA. (R. 30, 222). Holland's position with the ILA was described as being the third in command in a district that extended from Cape Hatteras, North Carolina, to the Florida Keys to Brownsville, Texas, and encompassed 127 local unions. (R. 178-180).

[1] 29 U.S.C. § 152(11) of the NLRA defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 164(a) indicates that "supervisors" are not "employees" within the definition of the NLRA.

When Trione and Holland discussed the proposed union organizing campaign, Trione made it clear that the organization was to be composed of ship superintendents. (R. 31). Holland told Trione that he would like to organize the ship superintendents, but that he had a few legal problems to work out and would get back to him. (R. 30).

Two or three months later, Trione contacted Holland again and was told that Holland had worked out the legal problems and that Trione should "get the guys" and set up a meeting. (R. 31). Around this same time, Trione had contacted Holland's office and asked if he could be provided with something to show what pay rate the ship superintendents might expect if they unionized. (R. 31). Trione was told that he would be sent the pay schedule for "walking foremen," a position which was one step below a ship superintendent. (R. 30). Trione received this pay schedule in the mail, and Davis saw it before he made a decision to sign a pledge card in an attempt to join the ILA. (R. 32, 134).

On April 12, 1981, a meeting was held in Daphne, Alabama, where some fifteen to twenty ship superintendents were present along with Benny Holland. (R. 34). One of the ship superintendents at this meeting was Davis. (R. 130-131). The purpose of the April 12, 1981, meeting was for the ship superintendents to hear what

the ILA could do for them if they organized. (R. 131-132). Davis had signed a pledge card on April 9, 1981, but retained possession of it until after Holland made his appearance and representations at the April 12, 1981, meeting. (R. 131-132). Davis testified that he wanted to hear what Holland had to say before he turned in his card. (R. 131-132). Trione also testified that although he and Davis signed their pledge cards on April 9, 1981, they made no decision as to whether to join the ILA until after they heard what Holland said on April 12, and they retained possession of those cards until they heard what Holland had to say. (R. 65). Trione further testified that they did not pay the application fee which was required by the ILA until after they heard what Holland had to say, and also, that they did not sign the ILA's charter until after Holland made his representations. (R. 66).

Virtually everyone who testified, including the witnesses for the ILA, admitted that the ship superintendents were fearful of losing their jobs if they tried to form a union. (R. 36, 72, 96-97, 117, 133, 195, 221, 228-229). The evidence is overwhelming that at the April 12, 1981, meeting, Benny Holland told these ship superintendents, including Davis, that once they signed the pledge cards and the charter and paid their application fee, they would be protected by the ILA. (R. 31, 36-37, 40, 54-55, 65-66, 72, 74, 93, 96-97, 101, 107, 117). Specifically, Holland told the ship superintendents, including Davis, that if they signed the pledge cards and charter application and still lost their jobs, the ILA would get their jobs back for them with back pay. (R. 36-37, 40, 53-55, 72, 74, 101, 107, 117). Holland never told Davis and the other ship superintendents at this meeting that if they

were supervisors within the meaning of the NLRA, the ILA had no ability whatsoever to get their jobs back with back pay if they were fired. (R. 36, 77, 79, 80-81, 83, 93, 101, 108, 148). As a matter of fact, Holland had mentioned to Trione in their first conversation, long before the April 12, 1981, meeting, that there were a few legal problems with the ship superintendents organizing, but told Trione before the meeting that he had the legal problems worked out. (R. 31, 40-41).

Holland, of course, testified that he told the ship superintendents at the April 12, 1981, meeting that if they were supervisors, they were not protected under the law, and the ILA could only provide them with a lawyer if they lost their jobs. (R. 227-228). Holland testified that he had an ILA attorney checking on the legality of the ship superintendents organizing and that he had no answer to this question at the time of the April 12 meeting. (R. 227-228). However, no one denies that Holland brought to the meeting a charter application for the ship superintendents to sign, and that he accepted a check for their application fee. (R. 244-245).

Obviously, in the face of the overwhelming testimony of Davis, Trione and the other ship superintendents who attended the April 12 meeting, the jury did not believe Holland.

On the very next day after the April 12, 1981, meeting, Trione was fired by Ryan-Walsh for his union activities. (R. 39). The ILA then hired an attorney to represent Trione. (R. 40). As the ILA acknowledges in its Brief at page 5, the attorney filed an unfair labor practice charge against Ryan-Walsh with the National Labor Relations Board ("NLRB"). (J.A. 10a). The Regional Director of

the NLRB refused to issue a complaint, based upon a factual determination that Trione was a "supervisor" and thus not protected under the NLRA. (J.A. 62a).

Shortly after his discharge, Trione began picketing Ryan-Walsh, which filed a suit in Circuit Court of Mobile County to enjoin Trione from continuing his picketing. (R. 40). The ILA attorney represented Trione in this proceeding and again, he was held to be a "supervisor" under the NLRA. (J.A. 56a-61a). The Circuit Court of Mobile County granted a preliminary injunction and ordered Trione to cease picketing.

In his findings of fact, the circuit court judge specifically found that Trione, as one of the ship superintendents, "has authority, in the interest of Ryan-Walsh, to hire, transfer, suspend, discharge, assign, reward and discipline other employees, or has responsibility to direct them and to adjust their grievances, or to effectively recommend such action, all based on their independent judgment." (J.A. 57a). In his conclusions of law, the circuit court judge held that:

> 1. The Plaintiff's ship superintendents are supervisors within the meaning of § 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11). The Defendant's attempt, while employed as a ship superintendent, to organize Plaintiff's ship superintendents for purposes of collective bargaining was not conduct protected by the National Labor Relations Act, *either arguably or otherwise*.

(J.A. 59a, emphasis added).

The ILA correctly points out that Trione did not appeal from the ruling of the NLRB Regional Director,

nor did he appeal from the circuit court's ruling granting the preliminary injunction against further picketing. However, it must be clearly noted that when these decisions to forego the various appeals were made, Trione was represented by an attorney hired by the ILA. (R. 40).

Shortly thereafter, on May 18, 1981, Davis was fired for attempting to join the union. He searched the docks for other stevedoring-related jobs, but could find none. (R. 136). He looked diligently, but did not find anything for three months. (R. 136-137). During this period, he had virtually no income other than unemployment compensation of $90 per week for six weeks. (R. 137). At the time he was fired from his job with Ryan-Walsh, Davis was earning over $1,200 per month. (R. 137).

II. PROCEEDINGS IN THE ALABAMA COURTS

Davis filed this suit in the Circuit Court of Mobile County, Alabama, seeking damages from the ILA for knowing, willful and reckless misrepresentation. (J.A. 1a, 12a). The ILA duly answered the complaint and failed to raise any federal statutory or constitutional defenses. (J.A. 14a). The ILA then filed a Motion for Summary Judgment and again failed to raise federal statutory or constitutional issues. (J.A. 19a). This case proceeded to trial, and the ILA failed to amend its answer to include any federal statutory or constitutional defenses. (J.A. 1a-6a).[2] During the trial, the ILA filed Motions for Directed Verdict at the end of Davis' case-in-chief and at the end of all the testimony; again, the ILA failed to raise federal

[2] Alabama Rules of Civil Procedure 15(a) allows amendment of pleadings at any time and states that amendment shall be freely allowed.

statutory or constitutional defenses. (J.A. 49a, 66a). It was not until after the jury returned its verdict and the ILA filed its Motion for Judgment *Non Obstante Veredicto* (J.N.O.V.) or in the Alternative, a New Trial, that the issue of federal preemption was raised.[3]

The ILA points out in its Brief that the trial court instructed the jury not only on intentional misrepresentation, but also on reckless and innocent misrepresentation. (ILA Brief, p. 6; J.A. 82a). However, the ILA failed to object to the court's charge on reckless and innocent misrepresentation. (J.A. 90a-93a).[4] After hearing all of the evidence, the jury returned a general verdict in favor of Davis for $75,000.[5]

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[3] Alabama Rules of Civil Procedure 8(c) states that any matter constituting an avoidance or affirmative defense must be affirmatively pleaded or it is waived. In *Powell v. Phenix Federal Savings & Loan Ass'n*, 434 So.2d 247 (Ala. 1983), the Supreme Court of Alabama had previously held that federal preemption must be raised as an affirmative defense or it is waived.

[4] Alabama Rules of Civil Procedure 51 states that: "No party may assign as error the giving or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge unless he objects thereto before the jury retires to consider its verdict, stating the matter to which he objects and the grounds of his objection."

[5] The ILA states in its Brief that this verdict could have been based merely upon a finding that the ILA represented to Davis that he could join the union. (ILA Brief, p.7, n.11). The ILA indulges in this sheer speculation because it interprets the judge's charge to mean such. A fair reading of the judge's charge certainly does not leave that impression. (J.A. 79a-89a). In any event, the ILA failed to object to the oral charge. (J.A. 90a). *See* n.4, *supra*. Most importantly, it must be noted that the jury rendered only a general verdict, which must be taken to mean that the jury found in favor of Davis on all counts, including the intentional misrepresentation count. No attempt was made by the ILA to have the jury render special verdicts, or to have the jury answer written interrogatories, as provided by Alabama Rules of Civil Procedure 49(b) and 49(c).

The Supreme Court of Alabama unanimously upheld the judgment in Davis' favor on the ground that the Circuit Court of Mobile County had subject matter jurisdiction over state statutory fraud cases. *ILA v. Davis*, 470 So.2d 1215 (Ala. 1985). The Alabama Supreme Court held that since the Mobile Circuit Court clearly had jurisdiction, the ILA's federal preemption defense was an avoidance or affirmative defense under Rule 8(c) of the Alabama Rules of Civil Procedure. Since the ILA had not properly pleaded its preemption defense, the Alabama Supreme Court held that it was waived.

This appeal by the ILA followed.

SUMMARY OF ARGUMENT

The Circuit Court of Mobile County, Alabama, is a court of general jurisdiction under Ala. Const., art. VI, amend. 328, § 6.04 (1901), and there can be no question but that it had subject matter jurisdiction to entertain Davis' state statutory fraud action. *See also Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). Because the ILA's assertion of its preemption defense was, in reality, nothing more than a challenge to the court's *exercise* of its legitimate power, it was properly considered to be an affirmative defense. Therefore, under the Alabama Rules of Civil Procedure 8(c), the ILA's assertion of its federal preemption defense was waived because not timely pleaded.

This Court's holdings in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978); *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966); and *Bel-*

knap, Inc. v. Hale, supra, justify finding that Davis' state statutory fraud action is not preempted by the NLRA. Davis was a supervisor under the NLRA, and his case presents no facts under which he could seek redress before the NLRB. *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982), *aff'd sub nom. Automobile Salesmen's Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). Therefore, the fraud action which was brought in state court is not identical to any issue Davis could have presented to the NLRB. Thus, Davis' fraud action is only of peripheral concern to the NLRB. Additionally, as this Court has recognized in many cases, Alabama and the other states which comprise our federal system have a compelling interest in protecting their citizens from intentionally tortious actions like fraud and misrepresentation.

The ILA's argument that Davis must have presented the "employee-supervisor" question to the NLRB is not fatal to Davis. This Court has already held that, if one is clearly a supervisor, the Court can make such a finding even though the issue was never decided by the NLRB. *Local 926, Operating Engineers v. Jones*, 460 U.S. 669 (1983). Furthermore, the NLRB Regional Director had already determined that another ship superintendent was a supervisor. Even if the "employee-supervisor" issue could have been presented by Davis to the NLRB, and even if a portion of Davis' cause of action does arguably fall within the confines of the NLRA, this Court's decisions in *Sears, Roebuck, supra*, *Farmer, supra*, *Linn, supra*, and *Belknap, supra*, indicate that Davis' state fraud claim is not preempted.

Contrary to the ILA's argument, the jury verdict was not entered on the theory of "strict liability." The verdict

clearly included punitive damages, which, as the trial judge instructed, could only be returned if the jury found the ILA's fraud was knowing and/or reckless. The compensatory damages proven by Davis were mathematically discernible and amounted to less than the $75,000 verdict, so that the remainder of the damage award had to have included punitive damages.

Furthermore, the ILA failed to object to the judge's charge with respect to innocent misrepresentation and failed to request special verdicts or written interrogatories for the jury so that it (the ILA) could determine on what issues the jury found in favor of Davis. The jury returned only a general verdict, and it must therefore be held that all issues were decided in favor of Davis, including the intentional misrepresentation issue.

Finally, the jury's verdict, including punitive damages, was not excessive given the severe nature of the ILA's wrongful conduct.

ARGUMENT

I. IN STATE TORT CASES, WHERE THE STATE COURTS HAVE UNQUESTIONED SUBJECT MATTER JURISDICTION, THE DEFENSE OF FEDERAL LABOR LAW PREEMPTION IS MERELY AN AFFIRMATIVE DEFENSE, WHICH MUST BE RAISED OR WAIVED.

This case was filed by Davis against the ILA seeking damages for statutory fraud under Alabama law. (J.A. 11a). There can be no question that the Circuit Court of Mobile County had subject matter jurisdiction since it is

a court of general jurisdiction in the State of Alabama. Ala. Const., art. VI, amend. 328, § 6.04 (1901); Ala. Code, § 6-5-101, *et seq.* (1975); *ILA v. Davis*, 470 So.2d 1215, 1217 (Ala. 1985).

The Supreme Court of Alabama correctly held that the ILA's assertion of the defense of federal preemption, under the facts of the case at bar, was an affirmative defense which was waived because not timely pleaded.[6]

In its opinion in the case at bar, the Alabama Supreme Court recognized that:

> [S]ubject matter jurisdiction can neither be conferred by agreement nor can it be waived. Indeed, it is incumbent upon the court to notice subject matter jurisdiction *sua sponte*.

470 So.2d at 1216. However, in response to the ILA's tardy attempt to assert a preemption defense, the court reasoned that:

> [I]t is not the circuit court's subject matter jurisdic-

[6] The Alabama Rules of Civil Procedure 8(c) states as follows:

> *Affirmative defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

See also, Powell v. Phenix Federal Savings and Loan Ass'n, supra, wherein the Alabama Supreme Court had previously held that the preemption defense is an affirmative defense under the Alabama Rules of Civil Procedure 8(c) and thus must be pleaded or it is waived.

> tion to adjudicate a damage claim for the tort of fraud—even if it arises in the context of a labor-related dispute—that is preempted. Rather, it is the state court's *exercise* of that power that is subject to preemption.

470 So.2d at 1216 (emphasis in original). The Alabama Supreme Court noted that this analysis preserves the distinction between the procedural question of when the issue of preemption must be raised to invoke appellate review and the substantive question concerning the resolution of the preemption issue on the merits. Because the ILA's belated assertion of preemption challenged, in reality, only the state court's exercise of its legitimate power, and not its unquestioned jurisdiction even to hear the case, the Alabama Supreme Court was correct in holding that preemption, as used therein, was an affirmative defense which the ILA failed to properly raise or preserve for appellate review.

Admittedly, when a particular issue has been placed by Congress within the primary and exclusive jurisdiction of the NLRB, a state court will have no subject matter jurisdiction to adjudicate the issue. In such cases, any judgment issued by the state court will be *void ab initio* because subject matter jurisdiction is preempted. *See, e.g., Garner v. Teamsters Local 776*, 346 U.S. 485 (1953); *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).

However, this Court has repeatedly stated that Congress did not clarify the extent to which the NLRA displaces state law. *Lockridge, supra*, 403 U.S. at 289; *Brown v. Hotel Employees, Local 54*, ____ U.S. ____, 104 S. Ct. 3179, 3185-86 (1984); *Garner, supra*, 346 U.S.

at 488. This Court has thus recognized that it "cannot declare preempted all local regulation that touches or concerns in any way the complex inter-relationships between employees, employers and unions; obviously, much of this is left to the States." *Lockridge*, *supra*, 403 U.S. at 289.

Therefore, this Court has held that state courts are clearly vested with jurisdiction in many tort cases, such as those dealing with state misrepresentation and breach of contract actions by strike replacements, *Belknap*, *supra*; state trespass actions, *Sears, Roebuck*, *supra*; state tort remedies for intentional infliction of emotional distress, *Farmer*, *supra*; and state libel actions, *Linn*, *supra*.

Thus, it is clear from this Court's repeated analyses of the preemption issue in the labor-related context that the Alabama Supreme Court was correct when it stated that the NLRA does not preempt a state court's subject matter jurisdiction over tort claims which have clearly been vested within the state's power. Rather, the NLRA is in the category of legislation that ". . . may preempt the state court's *exercise* of its otherwise valid jurisdiction over a particular field of law . . . ." *ILA v. Davis*, *supra*, 470 So.2d at 1217.

There is no question but that the Circuit Court of Mobile County had subject matter jurisdiction over Davis' fraud action. *See*, *e.g.*, *Belknap*, *supra*. When the ILA failed to raise preemption as a defense until after the jury returned a verdict, the ILA failed to follow the procedural requirement in Alabama state court that any matter constituting an avoidance or affirmative defense must be pleaded or it is waived. Alabama Rules of Civil

Procedure 8(c). Therefore, under established Alabama procedure and case law, the ILA failed to preserve the issue of federal preemption for appellate review. Alabama Rules of Civil Procedure 8(c); *Powell v. Phenix Federal Savings and Loan Ass'n*, *supra*.[7]

Since Davis' state fraud claim is clearly within the subject matter jurisdiction of the Alabama courts, it is obvious that any preemption defense in this case does not truly raise a subject matter jurisdictional challenge. Rather, as the Alabama Supreme Court held, the assertion of preemption by the ILA in defense of Davis' tort claim challenged only the effect of the state court's *exercise* of its legitimate power. Preemption in these circumstances (where the state court clearly has jurisdiction) is merely an affirmative defense, to be raised or waived. Indeed, this Court has often held that even constitutional rights are in the nature of affirmative defenses, which must be timely raised or waived. *See*, *e.g.*, *Herndon v. Georgia*, *supra*; *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (1940); *Illinois v. Gates*, 462 U.S. 213 (1983).

Thus, the Alabama Supreme Court was correct in holding that the ILA had waived its defense of federal preemption, where, in reality, that defense challenged not

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[7] In *Herndon v. Georgia*, 295 U.S. 441 (1935), this Court held that an appellant who failed to raise federal questions timely under the procedural law of the State of Georgia lost the right to have this Court pass on the federal questions unless the state court actually entertained and decided the questions. In the case at bar, the Supreme Court of Alabama refused to entertain and decide the preemption issue on the ground that it was improperly and untimely raised under the procedural and case law of Alabama. Therefore, the ILA, through its own procedural shortcomings, has lost its right to now have this Court decide the issue of preemption.

the subject matter jurisdiction of the state court, but only the exercise of its legitimate power.

II. DAVIS' ALABAMA FRAUD CLAIM IS NOT SUBJECT TO FEDERAL LABOR LAW PREEMPTION BECAUSE THE STATE CLAIM IS NOT IDENTICAL TO ANY ISSUE WHICH COULD HAVE BEEN BROUGHT TO THE NLRB; AND THE STATE OF ALABAMA HAS A DEEPLY ROOTED LOCAL INTEREST IN PROTECTING ITS CITIZENS FROM FRAUD.

In *San Diego Building Trades Council, Local 2020 v. Garmon*, 359 U.S. 236 (1959), this Court indicated that when it is clear or may fairly be assumed that the activities which the state purports to regulate are protected by § 7 of the NLRA or constitute an unfair labor practice under § 8 of the Act, due regard for the federal enactment requires state jurisdiction to yield. However, in *Garmon*, *supra*, the Court also enunciated a broad exception to this rule when it stated that:

> . . . due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

Id., 359 U.S. at 243-44 (citations omitted).

Since *Garmon*, *supra*, this Court has held that the critical inquiry determining whether state regulation is preempted is whether the controversy presented to the state court is *identical* to or different from that which could have been, but was not, presented to the NLRB. *Sears, Roebuck*, *supra*, *Linn*, *supra*, *Belknap*, *supra*, *Brown v. Hotel Employees*, *supra*. It is only when the controversy presented to the state court is *identical* to that which could have been presented to the NLRB that a state court's exercise of jurisdiction necessarily involves a risk of interference with the administrative scheme of the federal labor law. *See*, *e.g.*, *Sears, Roebuck*, *supra*, 436 U.S. at 197. Therefore, this Court has often permitted states to enforce their substantive tort law even where certain aspects of the underlying controversy were arguably within the regulatory jurisdiction of the NLRB.

For instance, in *Linn*, *supra*, this Court held that false and malicious statements made in the course of a labor dispute were actionable under state law if injurious to the complainant's reputation, even though such statements were in themselves unfair labor practices adjudicable by the NLRB. In *Farmer*, *supra*, this Court held that the NLRA did not preempt a state action for intentional infliction of emotional distress, even though a major part of the cause of action consisted of conduct that was arguably an unfair labor practice. In *Sears, Roebuck*, *supra*, this Court held that a state trespass action was permissible and not preempted, even though the picketing involved was arguably protected or prohibited by the NLRA. Most recently, in *Belknap*, *supra*, the Court refused to declare preempted state causes of

action for breach of contract and misrepresentation brought by "permanent" replacements who were fired when the employer rehired economic strikers, even though certain actions of the employer were arguably unfair labor practices under the NLRA.

Thus, the critical question herein is whether Davis' state fraud claim is identical to any claims which could have been raised to the NLRB. As will be discussed *infra*, Davis respectfully asserts that the state fraud claims which he has raised bear no resemblance to any NLRB claim which might have been brought, notwithstanding the ILA's frail attempt to argue that the issue of Davis' supervisory status is the "identical" issue which *must* have been presented to the NLRB.

While the application of *Sears, Roebuck*, *supra*, *Farmer*, *supra*, *Belknap*, *supra*, and *Linn*, *supra*, is not dependent upon whether one is an "employee" or "supervisor" within the meaning of the NLRA, the ILA's major argument is that Davis could not be deemed to be a "supervisor" unless and until the National Labor Relations Board finally determined the question. The ILA urges that Davis was arguably an "employee" within the Act, and, if he was, the alleged misrepresentation was arguably protected by § 7 of the Act, or amounts to an unfair labor practice under § 8.[8] (ILA Brief, pp. 14-16). The ILA cites this Court's holdings in *Local 207, Iron*

[8] While the ILA argues that Davis might have been an "employee" and that only the NLRB can make this determination, it must be noted that the ILA cites no actual facts tending to show that Davis *was* an employee. What the uncontested facts do indicate is that Davis, as a ship superintendent, was a supervisor. At the trial, for instance, the ILA elicited no testimony to challenge Mr. Trione's delineation of the duties of a ship superintendent.

Workers v. Perko, 373 U.S. 701 (1963) and *Local 926, Operating Engineers v. Jones*, *supra*, as support for its contention that Davis' status as a supervisor must have been finally determined by the NLRB before he could proceed with his fraud action in a state court. (ILA Brief, pp. 16, 21). The ILA has failed to study closely this Court's cases because the Court clearly recognizes that one's status as a "supervisor" can be determined by the Court as opposed to the NLRB, in the first instance.

In *Local 926, Operating Engineers v. Jones*, *supra*, Jones was employed in a supervisory position and was fired. He filed a charge with the Regional Director of the NLRB against a union alleging that the union had procured his discharge and thus coerced his employer in the selection of its supervisors and bargaining representatives in violation of § 8(b)(1)(A) and (B) of the NLRA. Jones alleged in his charge that, in his supervisory position, he had collective-bargaining responsibilities. The Regional Director of the NLRB refused to issue a complaint on Jones' behalf because he determined that there was insufficient evidence to establish that the union had caused Jones' discharge. The Regional Director further determined that there was no evidence to indicate that the union had restrained or coerced Jones' employer in the selection of its collective-bargaining representatives. In reviewing the Georgia court's opinion, this Court aptly pointed out that the Regional Director did not refuse to issue a complaint on the grounds of Jones' supervisory status. *Jones*, 460 U.S. at 680. Even though the NLRB had never determined Jones to be a supervisor within the purview of the NLRA, this Court held that there was no doubt that Jones was a supervisor. *Id.*, 460 U.S. at 679. Thus, this Court found Jones to be a supervisor even

when the NLRB had never passed on the issue.

Indeed, this Court stated in *Sears, Roebuck*, *supra*, as follows:

> Where only a minor aspect of the controversy presented to the state court is arguably within the regulatory jurisdiction of the Labor Board, the Court has indicated that the *Garmon* rule should not be read to require "preemption" of state jurisdiction. The Court has also indicated that if the state court can ascertain the actual legal significance of particular conduct under federal law by reference to "compelling precedent applied to essentially undisputed facts," the Court may properly do so and proceed to adjudicate the state cause of action.

Id., 436 U.S. at 188 n.13 (citations omitted).

Given the very clear definition of a supervisor set out in § 2(11) of the NLRA, the very clear delineation of a ship superintendent's duties set out by Trione during the course of the trial (R. 29), the ruling by the Regional Director of the NLRB that ship superintendent Trione was a "supervisor" under the Act (J.A. 62a),[9] and the ruling by the Circuit Court of Mobile County in the Trione preliminary injunction action (J.A. 59a), this Court's holdings in *Sears, Roebuck*, *supra*, and *Jones*, *supra*, mandate the conclusion that Davis' "supervisory" status was clearly established and therefore the Alabama courts could recognize this fact. Davis' duties as a ship superintendent very clearly made him a "supervisor" under the NLRA. Furthermore, the ILA never elicited any testimony to

[9] Again, it must be pointed out that Trione was represented by an attorney provided by the ILA when he failed to appeal from the Regional Director's finding that he was a supervisor. (R. 40).

challenge Trione's explanation of the duties of the ship superintendents who worked for Ryan-Walsh. Therefore, the Alabama courts simply applied compelling precedent to essentially undisputed facts to determine that Davis was a supervisor. *Garmon*, *supra*, 359 U.S. at 246.

Thus, under this Court's ruling in *Jones*, *supra*, 460 U.S. at 679, the NLRB did not have to pass on this issue before the Court could. At least in Davis' case, there was a factual determination by the NLRB Regional Director that a ship superintendent, performing the same duties as Davis, was a supervisor and was not protected by the NLRA. (J.A. 62a). In *Jones*, there was never a ruling by the Regional Director or anyone else associated with the NLRB that Jones was a supervisor, and this Court still held that he was clearly such. *Id.*, 460 U.S. at 679.

In *Local 207, Iron Workers' Union v. Perko*, *supra*, this Court held that Perko had a fluctuating status as a foreman and a superintendent in the construction industry. Because of this fluctuating status, and because of the peculiar nature of the construction industry, Perko was arguably an "employee" under the NLRA; thus, his state court complaint actually alleged unfair labor practices under § 8 of the NLRA. Additionally, the Court held that, even if Perko's supervisory status were conceded, state court jurisdiction would still be preempted because the union's insistence on Perko's discharge for his failure to comply with union rules violated § 8(b)(1)(A) of the NLRA by its inevitable tendency to coerce non-supervisory employees into observing those rules.[10] Finally,

[10] The NLRB has undercut much of the rationale underlying *Perko* since it has now determined that the discharge of a supervisor for failure to abide by union rules is not enough to discourage employees from

the Court held that if a union forces an employer to discharge a supervisor and thus coerces the employer in the selection of its representative for collective-bargaining purposes, § 8(b)(1)(B) of the NLRA is arguably violated also.

The ILA does not argue that Davis' state statutory fraud action is preempted because, as a supervisor, he was expected to deal with grievances arising under a collective-bargaining agreement. Indeed, there was absolutely no evidence elicited at trial that Davis had anything at all to do with grievance handling. Therefore, the ILA must recognize that attempted reliance upon *Jones*, *supra*, and *Perko*, *supra*, to establish that Davis' tort claim is preempted is fruitless. Simply stated, since the ILA makes no argument that Davis was in any way the subject of a coercive discharge under § 8(b)(1)(B), the *Jones*, *supra*, and *Perko*, *supra*, cases are inapposite.

In *Hanna Mining Co. v. MEBA*, 382 U.S. 181 (1965), this Court had occasion to inquire into whether certain engineers had supervisory status, in order to determine whether a state court could exercise jurisdiction over picketing controversies. This Court indicated that a refusal of the NLRB General Counsel to issue a complaint can be credited with "unclouded legal significance" where such a refusal is illuminated by an explanation which squarely defines the activity. Added to the clear facts in this case, the Regional Director's ruling in the Trione unfair labor practice charge, that ship superintendents were supervisors, should be sufficient to establish Davis'

exercising their § 7 rights. *Parker-Robb Chevrolet, Inc.*, *supra*; *see also Jones*, 460 U.S. at 679, n.9.

status as a supervisor.[11] (J.A. 62a).

Once Davis' supervisory status is established, the ILA admits that ". . . a representation that the superintendents could not be discharged for union activities could never constitute an unfair labor practice." (ILA Brief, p. 15, n.18). Since ". . . [a]ctivity designed to secure organization or recognition of supervisors cannot be protected by § 7 of the Act, arguably or otherwise," *Hanna*, *supra*, 382 U.S. at 188, there can be no argument that Davis, as a supervisor, had any remedy whatsoever before the NLRB. Thus, the issues presented to the state court in Davis' fraud action cannot in any way be said to be identical to issues that he might have, but did not, submit to the NLRB. *Sears, Roebuck*, *supra*, *Linn*, *supra*, *Belknap*, *supra*, and *Farmer*, *supra*.

Indeed, the NLRB, in *Parker-Robb*, *supra*, overruled a long line of cases which had held that an employer violates the NLRA by discharging a supervisor who joins in the employees' protected activities. *Parker-Robb* clearly defines the few instances when a supervisor's discharge is protected under the NLRA. *See id.*, 262 NLRB at 402-03, and footnotes 5-8 therein. None of those instances have any application whatsoever to the case at bar. Therefore, Davis had nothing to present to the NLRB, arguably or otherwise; his state fraud claim is therefore not identical to any NLRB claim which could have been brought.

In the case at bar, the only "identical" issue the ILA has urged upon this Court is the question of whether

[11] It must be noted that Regional Directors exercise the delegated authority of the NLRB General Counsel. *See*, *e.g.*, 29 U.S.C. § 3(d).

Davis was a "supervisor." While arguing that Davis must have filed an unfair labor practice charge with the NLRB in order to litigate his state fraud claim, the ILA admits that *it* could have filed a § 8(a)(1) charge with the NLRB if Ryan-Walsh had interfered with Holland's appeal for union membership. Then the NLRB would have determined whether Davis was a "supervisor" or an "employee." (ILA Brief, p. 19). However, the ILA goes on to state that it never had occasion to file such a charge since its organizational activity did not take place on the Ryan-Walsh premises. (ILA Brief, p. 19). This assertion is most astounding. Could not the ILA have asserted that the firings of Trione and Davis for attempting to join the ILA at Holland's insistence was a violation of § 8(a)(1)? Certainly the Board has found § 8(a)(1) violations for an employer's interference with organizational activity that occurred beyond the perimeters of the employer's plant. Section 8 of the NLRA contains no requirement that union organizational activities take place on the employer's premises before the employer can be found guilty of illegally interfering with organizational activity.[12]

From the ILA's assertion that it had no occasion to file a § 8(a)(1) charge, can Davis not say that he also had

[12] The ILA's incredible assertion that it had no occasion to file an NLRB charge against Ryan-Walsh because its organizational activity occurred away from the employer's premises borders on the frivolous. Many NLRB cases have held that § 8(a)(1) is violated where an employer interferes with organizing campaigns which occurred away from the employer's premises. *See, e.g., NLRB v. Nueva Engineering, Inc.*, 761 F.2d 961, 967 (4th Cir. 1985). Furthermore, once Trione and Davis were discharged for attempting to join the ILA, the employer's "interference" was no longer limited to "off premises" activity, so the ILA had no reason not to avail itself fully of all of the NLRB processes.

no occasion to file a charge because he was clearly a supervisor and thus not protected by the NLRA? That seems a much more plausible position. The ILA had the ball in its court when it hired an attorney for Trione, who then filed an unfair labor practice charge. After the Regional Director of the NLRB ruled that Trione was a supervisor, it was the ILA's hired attorney who let the ball lie and failed to appeal to the NLRB General Counsel.

This point is most important when the Court's holding in *Sears, Roebuck, supra*, is considered. There, this Court held that:

> If there is a strong argument that the trespass is protected in a particular case, a union can be expected to respond to an employer demand to depart by filing an unfair labor practice charge; the protection question would then be decided by the agency experienced in accommodating the § 7 rights of unions and the property rights of employers in the context of a labor dispute. *But if the argument for protection is so weak that it has virtually no chance of prevailing, a trespassing union would be well advised to avoid the jurisdiction of the Board and to argue that the protected character of its conduct deprives the state court of jurisdiction. As long as the union has a fair opportunity to present the protection issue to the Labor Board, it retains meaningful protection against the risk of error in a state tribunal. In this case, the Union failed to invoke the jurisdiction of the Labor Board. . . .*

Id., 436 U.S. at 207 (emphasis added).

The ILA clearly could have filed an unfair labor practice charge against Ryan-Walsh, and at such time the

NLRB would have made a determination as to Davis' status. The ILA's explanation as to why it did not file such a charge is most amusing and absolutely is not supported by the law. The case at bar obviously presents a situation where the ILA realized that its argument for NLRB protection was so weak that it had virtually no chance of prevailing. The ILA thus decided to avoid the jurisdiction of the NLRB and simply argue in this case that the protected character of its conduct deprives the state court of jurisdiction. Without a doubt, if the ILA realistically felt that Davis and Trione were "employees" under the NLRA, it would have utilized fully all of the NLRB's processes in order to hold Ryan-Walsh guilty of unfair labor practices.

Even if a portion of the conduct in question herein is arguably prohibited or otherwise protected under the NLRA, Davis' cause of action for fraud is of only peripheral concern thereto. Even the ILA admits that, as a supervisor, Davis could never secure reinstatement or back pay from the NLRB in this case. (ILA Brief, p. 15, n.18). Therefore, his state fraud action, like the state fraud action in ***Belknap***, ***supra***, is of no more than peripheral concern to the NLRB and federal labor policies.

The several states surely have a substantial and deeply rooted interest in protecting their citizens from misrepresentations which might cause them grievous harm. In *Linn*, *supra*, this Court stated that:

> [T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected.

Id., 383 U.S. at 67. ***See also Belknap***, ***supra***.

Holland told Davis a "known lie" to attempt to induce him into joining and doing organizing work for the ILA, and totally disregarded the potential for grievous harm to Davis. Providing a remedy for such action is deeply rooted in Alabama law, and Alabama has a compelling interest in stopping such conduct through the allowance of both compensatory and punitive damages in civil actions for fraud. Most recently, in ***Brown v. Hotel Employees***, ***supra***, and ***Belknap***, ***supra***, this Court clearly struck the preemption balance in favor of the state's compelling interest in protecting its citizens. The same reasoning applies to the case at bar.

Finally, in a last-ditch effort to have the state court judgment reversed, the ILA argues that the submission of the "strict liability" or "innocent misrepresentation" theory to the jury was inconsistent with federal labor law. However, in raising this argument, the ILA is again asking this Court to protect it from its own gross tactical errors. The ILA never objected to the trial court's charge to the jury on innocent misrepresentation, and under clearly established Alabama procedural law, the ILA is precluded from assigning error to this charge. (Alabama Rules of Civil Procedure 51; J.A. 90a-93a). As a matter of fact, the only objection along these lines was to the trial court's charge on punitive damages, thus implying that the ILA only objected to the charge on intentional and reckless misrepresentation because, under Alabama law, punitive damages are allowable only for intentional or reckless misrepresentations. (J.A. 92a). *Gulf Shores, Ltd. v. Powrzanos*, 442 So.2d 71 (Ala. 1983).

The ILA argues that since Davis' complaint only alleged knowing and reckless misrepresentation, it had

no chance to object to the "innocent misrepresentation" instruction until after the judge charged the jury. (ILA Brief, p. 17, n.22). However, under Alabama procedure, all parties are allowed to object after the judge charges the jury; in other words, the ILA was afforded the opportunity to object, but declined. (J.A. 90a-93a). The ILA argues that since it requested charges on scienter and the trial court refused some of them, the ILA effectively objected to the court's charge on innocent misrepresentation. (ILA Brief, p. 17, n.22). However, it should be noted that the trial court gave the jury ILA Requested Jury Charge No. 17, which was clearly a charge on scienter. (J.A. 77a-78a). In any event, the ILA argument that it effectively objected to the charge on innocent misrepresentation falls far short of the requirements of Rule 51 of the Alabama Rules of Civil Procedure. The ILA did not state its objection and certainly failed to set out the grounds therefor. Thus, any alleged error was not properly preserved for appellate review. *Childress v. Cooper Real Estate, Inc.*, 399 So.2d 286 (Ala. 1981).

The ILA also cites *Linn*, *supra*, in support of its contention that the trial court's innocent misrepresentation charge to the jury was reversible error. (ILA Brief, p. 17). In *Linn*, this Court held that, in order for a complainant to recover damages in a state libel action, he must prove that the libelous statements were made either knowingly or recklessly.

In the case at bar, the jury was charged on innocent misrepresentation, but the judge clearly told the jury that they could return only compensatory damages for innocent misrepresentation. (J.A. 79a-89a). The jury was also charged on knowing and reckless misrepresentation, for

which the judge charged it could return both compensatory and punitive damages. (J.A. 79a-89a). The jury then returned a general verdict in the amount of $75,000.

The ILA argues that the $75,000 general verdict cannot be read to include punitive damages, and thus the jury could have simply found for Davis on the innocent misrepresentation count, which would be violative of *Linn*, *supra*. Aside from the obvious fact that the general verdict must be considered favorable to Davis on all issues,[13] the ILA is again asking this Court to relieve it from its own gross tactical and procedural errors. Rule 49, Alabama Rules of Civil Procedure, allows for the submission of special verdict forms and written interrogatories to the jury, so that any party may determine the specific facts upon which a jury verdict was based. After the ILA heard the judge's charge on innocent misrepresentation, it not only failed to object, but it also neglected to ask for special verdict forms and written interrogatories. Now, when standing before the highest Court in the nation, the ILA engages in gross speculation over the meaning of a general jury verdict, having failed to procure a special verdict.

Further, the ILA admits in its Brief that Davis proved approximately $5,000 in lost earnings and that, at the time of the trial, he was earning approximately the same salary that he had made while at Ryan-Walsh. (ILA Brief, p. 23). Since Davis only put on evidence showing that he lost $5,000, it is obvious that the remainder of

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[13] Under Alabama law, a general verdict must be read to be a finding by the jury in favor of Davis on all issues. *Thrasher v. Darnell*, 275 Ala. 570, 156 So.2d 922 (1963); *Bank of Huntsville v. Witcher*, 336 So.2d 1384 (Ala. 1976).

the general jury award constitutes punitive damages, which could only be granted for intentional or reckless misrepresentation.[14] Thus, it is clear that by awarding punitive damages, the jury found for Davis on the issues of intentional and reckless misrepresentation, just as this Court mandated in *Linn*, *supra*.

Therefore, since the verdict was general and thus in favor of Davis on all counts, since the ILA failed to object to the charge on innocent misrepresentation or seek special verdicts, and since the general verdict obviously included punitive damages which can be awarded only for intentional and reckless misrepresentation, this judgment is not reversible on the grounds set forth in *Linn*, *supra*.

III. THE VERDICT IS NOT EXCESSIVE, GIVEN THE OVERWHELMING EVIDENCE THAT THE ILA COMMITTED KNOWING AND INTENTIONAL FRAUD.

The ILA's argument that the jury verdict is excessive was also raised and rejected in the Supreme Court of Alabama. In Alabama, the imposition and amount of punitive damages are left largely to the jury. *Ford Motor Credit Co. v. Washington*, 420 So.2d 14 (Ala. 1982). In *Carlisle v. Miller*, 275 Ala. 440, 444, 155 So.2d 689, 692 (1963), the Alabama Supreme Court held that:

> It is almost platitudinous to restate the guiding rules, but here they are: The verdict of a jury should not be interfered with merely because in the opinion

[14] The ILA is correct in stating that Davis also prayed for compensatory damages for future lost earnings and mental anguish. However, the trial judge failed to charge the jury on those issues. (J.A. 79a-89a).

> of the court the jury gave too little or too much; and the authority vested in the courts to disturb is one which should be exercised with great caution. Where, as here, there is no set standard for the admeasurement of damages but the damages to be awarded are left to the sound discretion of the jury, a remittur [*sic*] or a new trial should not be ordered on the ground of excessiveness of the jury's verdict except in those cases where the court can *clearly* see that the verdict has been reached on account of bias, passion, prejudice, corruption, or other improper motive or cause. And only where the damages allowed are so excessive as to warrant the belief that the jury must have been misled by some mistaken view of the merits of the case should the court interfere and set the verdict aside; also, where the trial court refuses to grant a new trial because he does not believe the verdict is excessive the favorable presumption attending the jury's verdict is thereby strengthened.

(Citations omitted) (emphasis added).

The ILA cites *IBEW v. Foust*, 442 U.S. 42 (1979) for the proposition that the jury's verdict is excessive. However, *Foust* dealt with a federal lawsuit by a union member for breach of the duty of fair representation. In *Foust*, this Court merely held that the Railway Labor Act does not permit the imposition of punitive damages in a duty of fair representation case. The reach of the *Foust* decision is open to dispute. *See id.*, 442 U.S. at 52 (Blackmun, J., concurring in the result).

The instant case presents a damage award concerning intentionally tortious conduct arising under the laws of a sovereign state. Different policy considerations are at

stake when a state court awards damages over intentional and willful tortious conduct as opposed to when a federal court awards damages in a duty of fair representation case.[15]

Given the gravity of the wrongs so obviously committed by the ILA in this case, it cannot fairly be said that the verdict is excessive. Furthermore, no federal policy supports the reversal of the jury's punitive damage award in this case.

CONCLUSION

For the reasons set forth above, Appellee Larry Davis asks this Honorable Court to dismiss the appeal of the ILA,[16] or to affirm the judgment of the Supreme Court of Alabama in all respects.

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[15] In *Foust, supra*, the majority recognized the broad and unique characteristics of the duty of fair representation, and sought to shield unions from excessive punitive damage awards under that cause of action. *Id.*, 442 U.S. at 48-51. It was recognized, for example, that "the prospect of punitive damages . . . could curtail the broad discretion that *Vaca* [*v. Sipes*, 386 U.S. 171 (1967)] afforded unions handling grievances." *Id.*, 442 U.S. at 51. These same considerations do not apply to intentionally tortious activities which are redressible under state law. The ILA can hardly argue that it needs broad discretion to commit knowing and intentional fraud. *See generally*, *Quinn v. DiGiulian*, 739 F.2d 637 (D.C. Cir. 1984) (reversing a jury award of punitive damages under the duty of fair representation theory, but affirming an award of punitive damages under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411 *et seq.*).

[16] The decision of the Alabama Supreme Court rests upon an interpretation of state procedural law. Thus, the lower court's decision is supported by an adequate and independent state ground which precludes this Court's judicial review of the instant case. *See* Appellee's Motion To Dismiss Appeal From State Court, pp. 14-16 (filed Sept. 6, 1985).

Respectfully submitted,

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APPENDIX

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appellee adds the following Constitutional and Statutory provisions to those listed by Appellant in its Brief.

(1) *Alabama Rules of Civil Procedure 8(c)*:

> (c) *Affirmative defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(2) *Alabama Rules of Civil Procedure 49(b) and (c)*:

> (b) *Special verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be

> made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.
>
> (c) *General verdict accompanied by answer to interrogatories.* The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the

general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(3) *Alabama Rules of Civil Procedure 51*:

Instructions to jury; objections. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file and, in such event, shall serve on all opposing parties written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. The judge shall write "given" or "refused" as the case may be, on the request which thereby becomes a part of the record.

Those requests marked "given" shall be read to the jury without reference as to which party filed the request. Neither the pleadings nor "given" written instructions shall go into the jury room. Every oral charge shall be taken down by the court reporter as it is delivered to the jury. The refusal of a requested, written instruction, although a correct statement of the law, shall not be cause for reversal on appeal if it

appears that the same rule of law was substantially and fairly given to the jury in the court's oral charge or in charges given at the request of the parties. No party may assign as error the giving or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge unless he objects thereto before the jury retires to consider its verdict, stating the matter to which he objects and the grounds of his objection. Submission of additional explanatory instructions shall not be required unless requested by the court. Additional instructions shall be submitted in writing, except that with respect to any additional instruction taken from Alabama Pattern Jury Instructions, it shall be sufficient to identify said instruction on the record by reference to the number and title of said pattern jury instruction. Opportunity shall be given to make the objection out of the hearing of the jury. In charging the jury, the judge shall not express his opinion of the evidence. (Amended effective March 1, 1984).

(4) *Ala. Const. art. VI, amend. 328, § 6.04 (1901)*:

(a) The states shall be divided into judicial circuits. For each circuit, there shall be one circuit court having such divisions and consisting of such number of judges as shall be provided by law.

(b) The circuit court shall exercise general jurisdiction in all cases except as may otherwise be provided by law. The circuit court may be authorized by law to review decisions of state administrative agencies and decisions of inferior courts. It shall have authority to issue such writs as may be necessary or appropriate to effectuate its powers,

and shall have such other powers as may be provided by law.

(5) *Labor-Management Relations Act, 29 U.S.C. § 152(3)*:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(6) *Labor-Management Relations Act, 29 U.S.C. § 152(11)*:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(7) *Labor-Management Relations Act, 29 U.S.C. § 164(a)*:

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

REPLY

BRIEF

No. 85-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Appellant,

v.

LARRY DAVIS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

Table of Authorities

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POINT I

The Court Has Jurisdiction Over This Appeal

Since the Alabama law of misrepresentation is statutory, *see* Ala. Code §6-5-101, *et seq.*, and the statute, as applied, has been upheld against a claim of preemption, the Court has jurisdiction of this appeal pursuant to 28 U.S.C. §1257(2). However, appellee argues that the Court is without jurisdiction to review the judgment of the Alabama Supreme Court because there exists an adequate and independent state law ground for the judgment. Appellee suggests that the holding by the Supreme Court of Alabama that appellant waived its claim of federal preemption constitutes an adequate and independent state ground. *See* appellee's brief at 32 n.16; appellee's motion to dis-

miss appeal at 14-16.[1] Appellee's attack on this Court's jurisdiction is premised upon a fundamental misconception of the adequate and independent state ground doctrine.

"[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, [the] jurisdiction [of this Court] fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935). *See also Minnesota* v. *National Tea Co.*, 309 U.S. 551 (1940). The rationale for the Court's refusal to decide cases where there is an adequate and independent state ground is "respect for the independence of state courts, as well as avoidance of rendering advisory opinions." *Michigan* v. *Long*, 463 U.S. 1032, 1040 (1983).

A litigant's procedural defaults in state proceedings, as well as state substantive law, may provide an adequate and independent ground for the state judgment. *See e.g.*, *Henry* v. *Mississippi*, 379 U.S. 443 (1965); *Fay* v. *Noia*, 372 U.S. 391 (1963); *Herndon* v. *Georgia*, 295 U.S. 441 (1935). However, the Court has long recognized that, "[W]here the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, [the Court's] jurisdiction is plain." *Michigan* v. *Long*, 463 U.S. 1032, 1038 n.4 (1983), quoting, *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917). *See also, Fox Film Corp.* v. *Muller*, *supra*, 296 U.S. at 210-11, ("our jurisdiction attaches where the non-federal ground is so interwoven with the other as not to be an independent matter"); *Minnesota* v. *National Tea Co.*, *supra*, 309 U.S. at 556, quoting *State Tax Commission* v. *Van Cott*, 306 U.S. 511, 514 (1939)

[1] See also brief for Amicus Council of State Governments at 8-10.

("these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the state law").

While the Court has looked to the language of the state court's opinion and other sources to determine whether the state court's judgment rests upon an adequate and independent state ground, the Court is not bound by a state court's assertion that independent state grounds support the judgment. To ensure that this Court remains as the ultimate arbiter of both the United States Constitution and federal law, the Court must "ascertain for itself . . . . whether the asserted non-federal ground independently and adequately supports the judgment." *Michigan* v. *Long*, *supra*, 463 U.S. at 1038, quoting *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773 (1931). In its most recent pronouncement on the adequate and independent state ground doctrine, the Court held that absent a "plain statement" from the state court that its judgment is alternatively based on bona fide separate, adequate, and independent state grounds, the Court will presume that the state court rested its decision primarily on federal law. *Michigan* v. *Long*, *supra*, 463 U.S. at 1041-42.

Applying these principles to the case at bar, it is eminently clear that the Alabama Supreme Court's ruling that appellant waived its preemption claim does not constitute an adequate and independent state ground for the judgment. The Alabama Supreme Court recognized that even as to an Alabama state court of general jurisdiction, "Subject matter jurisdiction can neither be conferred by agreement nor can it be waived." 479 So.2d at 1216. The court further recognized that the issue of whether the defense of federal preemption had been waived turned on whether "the National Labor Relations Act preempts the state courts of subject matter jurisdiction." *Id.* In ruling that the National Labor Relations Act did not

preempt it of subject matter jurisdiction to adjudicate this case, the Alabama Supreme Court of necessity interpreted the federal statute. Thus, the purported state ground is so interwoven with a question of interpretation of federal law that the state's procedural ruling cannot constitute an independent ground for the judgment.

The most recent decisions of this Court confirm that the defense of *Garmon* preemption is addressed to the subject matter jurisdiction of the state court. *Brown* v. *Hotel and Restaurant Employees Local 54*, 82 L.Ed.2d 373, 384 (1984) ("Congress intended to deprive the States of their ability to retain jurisdiction over such matters.") (*Garmon* preemption); *Allis-Chalmers Corp.* v. *Lueck*, 85 L.Ed.2d 206, 217 (1985); ("no authority . . . under state law") (§301 preemption); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 85 L.Ed.2d 728, 747 (1985) ("The States have no more authority than the Board to upset the balance that Congress has struck between labor and management") (*Machinists* preemption).[2]

In suggesting that only the state court's *exercise* of jurisdiction is preempted, 470 S.2d at 1216, the Alabama Supreme Court in effect characterizes the defense of preemption as affecting merely the justiciability of the state claim rather than the power of the state tribunal to adjudicate. Such an approach is totally inconsistent with this Court's decision in *Garmon*. The question of justiciability assumes jurisdiction and is addressed to the *discretion* of the court as to whether jurisdiction should be exercised. *Poe* v. *Ullman*, 367 U.S. 497 (1961). If state courts had discretion as to whether to honor preemption

[2] The rationale for depriving state courts of jurisdiction was "the perceived incapacity of common law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 286 (1971).

claims, conflicting adjudications would abound, and national labor policy would be frustrated.[3]

Since the defense of preemption goes to the subject matter jurisdiction of the state court, it is non-waivable as a matter of federal law. Thus, the Court need not consider whether Alabama's procedural rule, that defenses be affirmatively pleaded, serves a "legitimate state interest." *Henry* v. *Mississippi*, 379 U.S. 443, 447 (1965). However, even if the Court is to consider the validity of Alabama's interest in conserving "trial time" or judicial resources, that interest is adequately protected by Alabama's procedure that trial judges are required to notice on their own motion a failure of subject matter jurisdiction. *See* Ala. R. Civ. P. 12 (h)(3). The *Garmon* formulation was designed by this Court to be easily applied by state courts so that they could determine in the first instance limitations upon their jurisdiction.[4] Even where counsel neglects to call the defense to the court's attention, state courts may raise federal preemption on their own motion prior to trial. By raising the issue of federal preemption *sua sponte*, the state courts may avoid the waste of judicial resources involved in rendering determinations on matters which Congress has removed from their jurisdiction. Thus, Alabama's interest in conserving judicial resources is not sufficient to deprive the Court of jurisdiction to hear this appeal.

[3] Similarly, the fact that the Alabama Circuit Court is a court of general jurisdiction, 470 So.2d at 1217, is irrelevant to the question of preemption. Presumably every state in the nation has a trial court of general jurisdiction. If state courts of general jurisdiction were immune from preemption, the attainment of a uniform national labor policy would be impossible.

[4] "[T]he federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 290 (1971).

POINT II

The ILA's Organizational Activity Is Arguably Protected by §7 of the LMRA

Section 7 of the Labor-Management Relations Act guarantees to employees "the right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . " 29 U.S.C. §157. Since the superintendents are arguably employees, the ILA's appeal for union membership is arguably protected by §7.

Appellee suggests that the ILA's organizational activity, directed at the ship superintendents, was a "merely peripheral concern of the Labor-Management Relations Act." Appellee's brief at 16. In arguing that the ILA's organizational activity is not even arguably protected by §7, appellee defines too narrowly the type of conduct which is protected by the Act. This Court has recognized that, "[T]he right to organize is at the very core of the purpose for which the NLRA was enacted." *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180, 206, n.42 (1978). In particular, §7 includes "the right of union officials to discuss organization with employees." *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 542 (1972). Both unions and their officials are protected by §7 because the effectiveness of organization rights is dependent "on the ability of employees to learn the advantages and disadvantages of organization from others." *Id.* at 543. *See also, NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

Moreover, the Court has noted that in protecting the right to organize under §7, Congress intended "to encourage free debate on issues dividing labor and management." *Old Dominion Branch 496, Letter Carriers* v. *Austin*, 418 U.S. 264, 272 (1974), quoting *Linn* v. *Plant*

Guard Workers, 383 U.S. 53, 62 (1966). By protecting the "freewheeling use of the written and spoken word," *Letter Carriers*, 418 U.S. at 272, Congress meant to further the "federal policies favoring uninhibited, robust, and wide-open debate in labor disputes." *Id.* at 273. The Court has recognized that, "Wide latitude for what is written and said in election compaigns is necessary to insure the free exchange of information and opinions." *Id.* at 277 n.12. "Vigorous exercise of this right to persuade other employees to join must not be stifled by the threat of liability for the overenthusiastic use of rhetoric or the innocent mistake of fact." *Id.* at 277.[5]

In view of Congress' clear intent to encourage freewheeling debate during organizational drives, the states must be preempted from imposing liability for misrepresentations allegedly made in the course of organizing.[6] Viewed in the light of *Linn* and *Letter Carriers*, the ILA's statement that "the superintendents could get their jobs back," must be seen as embodying an opinion or belief as to the status of the superintendents as employees.[7] Opinions as to the status of prospective union members must be protected, if unions are to be allowed to organize new bargaining units.

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[5] Further support for the view that Congress intended to encourage free debate during labor organizational campaigns may be found in §8(c) of the Act. "The expressing of any views, arguments, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice . . . . " 29 U.S.C. §158(c).

[6] While no representation election was ever ordered in the present case, in view of the coercive discharges of Davis and Trione, there can be no question that labor and management were "locked in combat." *Letter Carriers*, 418 U.S. at 292 (Rehnquist, J. dissenting).

[7] Manifestly, there would be no purpose to the organizational activity if the union believed from the outset that the superintendents were not covered by the Act.

At the time the ILA was engaged in organizing Trione, Davis and their fellow superintendents, there had not even been a ruling by the Regional Director. The union did not have the benefit of hindsight. The possible penalty to appellant of having to face damage actions in the state courts for having guessed wrong (if that indeed be the case) is precisely why state courts are preempted. It is difficult to imagine a more inhibiting influence on organizational activity or debate than requiring a union to act at its peril with the possibility of draconian state penalties if events do not turn out as it forecasts.

Appellee relies heavily on *Belknap* v. *Hale*, 463 U.S. 491 (1983), as support for the proposition that state fraud actions arising from labor controversies are not preempted by the Act. *Belknap* is readily distinguishable from the present case. In *Belknap* the employer made promises of permanent employment to strike replacements, not to his existing employees. Thus, the representations were directed *outside* the bargaining unit. In *Belknap*, the preemption claim was based not on arguable protection under §7, but on the theory that the employer's offers of permanent employment were an unfair labor practice. *Id.* at 508.[8] The Court declined to find preemption in *Belknap* because "The Board would be concerned with the impact on strikers not with whether the employer deceived replacements." *Id.* at 510. Thus, separate controversies were presented, and there was no potential for interference with the Board's primary jurisdiction. Since *Belknap* involved a claim of arguable prohibition under §8, it is of little relevance to the present case where the claim of preemption is based on arguable protection under §7.

[8] While the employer referred to discharging the replacements as "protected activity," its theory was that discharging the replacements would be required by federal law, if hiring them was an unfair labor practice. *Id.*

POINT III

The Issue of Appellee's Supervisory Status Was Required to Be Submitted to the National Labor Relations Board

When Davis was discharged by his employer for union activities, it was incumbent upon him to file an unfair labor practice charge under §8(a)(1) or (3), 29 U.S.C. §158(a)(1)(3), prior to commencing an action against the union in state court. Had such a charge been filed, the NLRB might have ruled that Davis was an employee and ordered him reinstated with back pay, despite the failure of the Regional Director to issue a complaint on behalf of Trione. Even assuming that the Regional Director would not initially have issued a complaint in appellee's case, had appellee then appealed to General Counsel, General Counsel might have determined that appellee was an employee and directed the issuance of a complaint.[9]

Instead of pursuing his case before the Board, Davis filed a state misrepresentation action in which an essential element of the cause of action was the falsity of the representation on the part of the ILA. In order to find that the ILA's representation that Davis was an employee was false, the state jury was required to find that Davis was in fact a supervisor. The jury did not base its decision on any ruling by another tribunal as to Davis' status, for there has never been such a ruling. Rather, the jury independently determined whether Davis was a supervisor, based upon the analogy to Trione and upon evidence as to the ship superintendents' functions and role. Thus,

[9] Contrary to appellee's theory, the Regional Director does not exercise the delegated authority of General Counsel. Rather, General Counsel exercises "general supervision over all attorneys employed by the Board . . . and over the officers and employees in the regional offices," including the Regional Director. 29 U.S.C. §153(d).

to find liability the jury had to—and did—engage in deciding the question of employee status which Congress has entrusted to the NLRB.

As the Court noted in *Sears*, "The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." 436 U.S. at 202.[10] Since the issue of Davis' supervisory status might have been presented to the Board via a §8 charge or to the state court, primary jurisdiction requires that the issue be submitted to the Board. Indeed, the potential for interference with the Board's primary jurisdiction is particularly severe in this case because the issue of employee or supervisor status is a central concern of the Act, which this Court has noted is "most wisely entrusted initially to the Labor Board." *Iron Workers* v. *Perko*, 373 U.S. 701, 706 (1963).

Appellee attempts to excuse his own deliberate bypassing of Board procedures by suggesting that the ILA might have filed a §8(a)(1) charge on his behalf. Appellee's brief at 24. However, in the circumstances of this case, the ILA's failure to invoke the jurisdiction of the Board is not fatal to its preemption claim.

In *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180, 202 (1978), this Court held that the primary jurisdiction rationale "does not extend to cases in which an employer has no acceptable method of invoking, or inducing the union to invoke, the jurisdiction of the Board." Where the aggrieved party cannot invoke Board process, there is less basis for inferring that Congress intended to pre-

[10] Appellee suggests that *Sears* requires that the state *claim* be identical with the claim which could have been presented to the Board. Appellee's brief at 18. However, the Board does not have jurisdiction over any state claims, and so under appellee's reading of *Sears*, the state cause of action would never be preempted. It is clear that *Sears* requires only that the controversy or issue which could be presented to the Board be identical with that which was presented to the state court.

empt state court jurisdiction. However, the Court did not hold in *Sears* that an aggrieved party is free to sue in state court whenever the union fails to present the protection issue to the Board. In the case at bar, appellee had every opportunity to file an unfair labor practice charge with the Board, raising the issues of his employee or supervisory status and the corresponding illegality or legality of his discharge. That the Regional Director failed to issue a complaint based on Trione's charge did not foreclose Davis from invoking Board jurisdiction, particularly in view of the fact that Trione never appealed to General Counsel.[11]

Since appellee did not invoke Board jurisdiction, his state claim is preempted. Appellee seeks to avoid preemption by inviting the Court to weigh the strength of the ILA's argument that the superintendents are employees rather than supervisors. Appellee's brief at 25-26. However, neither *Sears* nor *Local 926, Operating Engineers* v. *Jones*, 460 U.S. 669 (1983) support the position that absent a Board determination, the issue of supervisory status should be determined by this Court. In *Jones*, the Court held that "it was for the Board, not the state courts, to decide whether Jones was the kind of supervisor who could invoke §8(b)(1)(B)." *Id.* at 680.

[11] Appellee suggests at p. 25 of his brief that Trione should be deemed to have exhausted his administrative remedies because his attorney was provided by the ILA, and the attorney failed to appeal to General Counsel. However, there is no evidence that the ILA in any way discouraged Trione's attorney from appealing to General Counsel. There is no question that Trione was the client and the attorney was subject to his direction and control. Moreover, since the NLRB's procedures are simple enough to be pursued by employees acting on their own, (J.A. 64a), Trione was free to pursue an administrative appeal with or without counsel. Finally, even if Trione could somehow be deemed to have exhausted his administrative remedies, appellee does not explain why Trione's exhaustion of administrative remedies in a collateral proceeding should be attributed to appellee.

In *Sears*, the Court held that the acceptability of arguable protection as a justification for preemption is "a function of the strength of the argument that §7 does in fact protect the disputed conduct," 436 U.S. at 203, only in those cases where the aggrieved party cannot present the protection issue to the Board. Since appellee had the opportunity to present the issue of his status to the Board, there is no occasion for this Court to weigh the strength of the employee or supervisor argument.[12]

Finally, even if the strength of the §7 argument were relevant to the preemption claim, no inference should be drawn from the failure of the ILA to file a charge on appellee's behalf. Appellee never requested the ILA to take any action relative to his discharge. (R. 236-37). While the six month unfair labor practice statute of limitations, 29 U.S.C. §160(b), had not expired at the time this action was commenced, it is understandable that the union did not seek to invoke Board procedures on appellee's behalf once litigation had ensued. Moreover, it appears that the superintendents' interest in the organizing drive had waned by that time. (R. 66).[13] Thus, the fact that the ILA did not file a charge on appellee's behalf is understandable in the circumstances of this case and is not fatal to the ILA's preemption claim.

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[12] Contrary to appellee's position, the actual status of the superintendents is far from clear. As noted in appellant's opening brief, the compensation of the superintendents is often inferior to that of the longshoremen. R. 34-35. While the superintendents hire the longshoremen on a daily basis and also direct them, the exercise of this authority is arguably of a "routine nature." 29 U.S.C. §152(11). Moreover, in Trione's charge, he averred through his attorney that he was an employee. J.A. 10a.

[13] The record is clear that the ILA never obtained the support of 30% of the bargaining unit, which is necessary to file a representation petition. 29 CFR §101.17; 101.18. Although there were at least 20 superintendents, (R. 34), only five authorization cards were signed. Plaintiff's exhibits 3, 6, 7, 9, and 11.

CONCLUSION

For the foregoing reasons and those in appellant's main brief, the judgment of the Alabama Supreme Court should be reversed and the case remanded with instructions to dismiss the complaint.

Dated: New York, New York
February 5, 1986

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(b)

No. 85-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Appellant,

v.

LARRY DAVIS,

Appellee.

On Appeal From The Supreme Court Of Alabama

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., AS *AMICUS CURIAE* FOR APPELLEE

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January 9, 1986

No. 85-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation, Inc., respectfully moves for leave to file the annexed brief as *amicus curiae* in support of appellee, and would show the Court:

I. Interest of *Amicus Curiae*.

The National Right to Work Legal Defense Foundation, Inc. (Foundation) is a nonprofit charitable organization formed to provide free legal aid to individual employees who suffer from violations of their civil rights as a result of compulsory unionism arrangements. The Foundation, through its litigation program, seeks to assure that all employees are fully protected in the exer-

cise of their free speech, due process and other fundamental rights guaranteed by the United States Constitution.

To this end, the Foundation's litigation program has supported many major constitutional cases concerning employees' rights to refrain from joining or supporting labor organizations. *See, e.g., Ellis v. BRAC*, ___ U.S. ___, 104 S. Ct. 1883 (1984); *Knight v. Minnesota Community College Faculty Association*, ___ U.S. ___, 104 S. Ct. 1058 (1984); *Hudson v. Chicago Teachers Union, Local No. 1*, 743 F.2d 1187 (7th Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S. Ct. 2700 (1985); *see also NLRB v. Machinists Local 1327*, 725 F.2d 1212 (9th Cir. 1984), *vacated and remanded*, ___ U.S. ___, 105 S. Ct. 3517 (1985).

Similarly, attorneys provided by the Foundation have utilized state tort and contract law to assist individual employees seeking to protect their right to work in an environment free of coercion, intimidation and violence. *See, e.g., Seritis v. Hotel and Restaurant Employees and Bartenders Union Local 28*, 167 Cal. App. 3d 78, 213 Cal. Rptr. 588 (1st Dist. 1985) (petition for review denied and order for non-publication issued by California Supreme Court, August 15, 1985) (petition for cert. pending) (suit under state law for intentional infliction of emotional distress against union which sought to force employees into prostitution); *DiLuzio v. United Electrical, Radio and Machine Workers, Local 274*, 386 Mass. 314, 435 N.E.2d 1027 (1982), *further proceedings*, 391 Mass. 211, 461 N.E.2d 766 (1984) (suit under state law for property damage and intentional infliction of emotional distress arising from a union's campaign of violence and physical abuse directed against a non-striker); *IAM Local 1297 v. Allen*, Case No. 85-176, Ohio Supreme Court (pending) (suit by four employees for misrepresentation, invasion of privacy and intentional infliction of emotional distress arising from a two-year campaign of abuse and violence perpetrated by a union); *Crawford v. United Steelworkers*, Nos. 820922, 820938, and 820948 (Va. October 11, 1985) (suit for intentional infliction of emotional distress and invasion of privacy arising from a union's violent abuse directed against non-strikers).

In many of these state court tort cases, unions rely upon the defense of federal preemption to attempt to shield themselves from liability for their tortious acts. As occurred in the instant case, it is not uncommon for unions defending state law tort actions to assert their preemption defense tardily, long after significant court proceedings have already taken place. For example, in *IAM Local 1297 v. Allen*, *supra*, the union did not raise a preemption defense until it found itself before the Ohio Supreme Court, appealing from a unanimous jury verdict of over $72,000 in compensatory and punitive damages. This is certainly an abuse of the preemption defense.

For the above reasons, the Foundation and the employees who are assisted by its legal aid program have a strong interest in ensuring that the defense of preemption is not abused by labor unions to shield themselves broadly from liability for their tortious activities.

II. Purpose of this Brief.

The Foundation's brief *amicus curiae* is designed to

show that when a union asserts a preemption defense in response to a state court tort claim, that assertion of preemption will, in most cases, be an affirmative defense to be raised or waived, rather than a non-waivable challenge to the subject matter jurisdiction of the state court. This Court's prior decisions teach that only in cases clearly within the sole and exclusive jurisdiction of the National Labor Relations Board ("NLRB") will a state court's jurisdiction be subject to preemption; in all other cases, including the instant case, only the state court's *exercise* of its legitimate judicial power may be subject to a preemption defense.

The opinion of the Alabama Supreme Court constitutes a commonsense effort to reconcile this Court's prior preemption cases, while at the same time ensuring that Alabama's legal system, both substantive and procedural, remains free from undue federal interference. Since there is no evidence that Congress intended to interfere with state procedural and substantive law to the extent advocated by the appellant ILA, this Court should affirm the state court decision.

If this Court reverses the Alabama Supreme Court's decision, the consequences will be to 1) encourage every union with a preemption defense to "sit on its hands" and, in effect, play roulette with the state judicial systems; 2) hinder the efficacy of notice pleading rules in state courts, because litigants will not be able to rely upon the answers and affirmative defenses asserted by their opponents; 3) unnecessarily interfere with the deeply rooted substantive state tort law of Alabama; and 4) shift the delicate balance of federal and state powers in the area of tort regulation, an area which traditionally

has been left to the several states.

For these reasons, the National Right to Work Legal Defense Foundation, Inc., requests that this Motion be granted and the annexed brief accepted for filing.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—continued

Statutes

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BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

INTEREST OF *AMICUS CURIAE*

The interest of the *amicus curiae* is contained in the Motion For Leave To File this Brief and is adopted herein.

SUMMARY OF ARGUMENT

Where Congress has clearly vested the adjudication of a particular issue within the primary and exclusive jurisdiction of the NLRB, then a state court will have no subject matter jurisdiction to adjudicate the issue, and any judgment by a state court on such issue will be *void ab initio*. In these situations, an assertion of preemption in defense of a state court lawsuit covering that issue will be a challenge to the subject matter jurisdiction of the state court and will therefore be non-waivable.

However, this Court has recognized that there exists a broad class of cases which Congress did not intend to vest exclusively within the NLRB, in part because those cases concern deeply rooted local issues traditionally adjudicated by the courts of the several states. *See, e.g., Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977). In this latter class of case, typified by tort actions customarily within the jurisdiction of the state courts, an assertion of "preemption" will not be a challenge to the subject matter jurisdiction of the state courts, but rather will be like any other affirmative defense, to be raised or waived. As the Alabama Supreme Court properly held, when a case raises issues of state tort law (which have traditionally been within the state court's jurisdiction as opposed to the NLRB's), preemption concerns only the effect of the state court's ultimate exercise of its legitimate power, not that court's subject matter jurisdiction even to hear the case.

ARGUMENT

I. A UNION'S ASSERTION OF PREEMPTION IN DEFENSE OF TRADITIONAL STATE COURT TORT LAWSUITS SUCH AS INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, TRESPASS AND MISREPRESENTATION IS NOT A SUBJECT MATTER JURISDICTIONAL ISSUE. IN TORT CASES, CUSTOMARILY CONSIGNED BY OUR FEDERAL SYSTEM TO THE JURISDICTION OF THE STATE COURTS, PREEMPTION WILL BE LIKE ANY OTHER AFFIRMATIVE DEFENSE, TO BE SEASONABLY RAISED OR WAIVED.

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959), this Court indicated that where the activities which the state purports to regulate are protected by § 7 of the NLRA or constitute an unfair labor practice under § 8, due regard for the federal enactment requires state jurisdiction to yield. However, this "yielding of jurisdiction" has been narrowly construed, and generally has been recognized only where the controversy brought to the state court is *identical* to that which could have been raised to the NLRB. *See, e.g., Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *Garner v. Teamsters*, 346 U.S. 485 (1953) (holding that Pennsylvania state court had no jurisdiction to adjudicate picketing litigation which was identical to an NLRB claim that the picketing violated § 8(b)(2) of the NLRA); *Local 207, Iron Workers v. Perko*, 373 U.S. 701 (1963); *Local 100, United Association of Journeymen v. Borden*, 373 U.S. 690 (1963); *see also Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978).

For instance, in *Lockridge, supra*, the union procured Lockridge's discharge because he had failed to meet the payment requirements of the union-shop clause. Lockridge sued the union for breach of his employment contract, even though the identical facts would have supported an unfair labor practice charge to the NLRB as a violation of §§ 8(b)(1)(A), 8(b)(2) and 8(a)(3). This Court held that, in establishing the NLRB to supervise federal labor law, Congress

> "did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally . . . . It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal . . . ."

Lockridge, 403 U.S. at 287, *quoting Garner v. Teamsters*, *supra*, 346 U.S. at 490-91. The critical factor in *Lockridge* was the identity of the state claim with the NLRB claims that could have been brought.

The "identity of claims" analysis was again highlighted by this Court in *Sears, Roebuck & Co.*, *supra*. There, the Court held that a state court *did* have the jurisdiction to enjoin trespassory picketing. The Court stated that,

> The critical inquiry. . . is . . . whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.

Id. at 197. *See also Local 100, United Association of Journeymen v. Borden*, *supra*, and *Local 926, Operating Engineers v. Jones*, 460 U.S. 669 (1983), both of which utilized the "identity of claims" analysis to hold that the state courts were jurisdictionally barred from adjudicating claims identical to those vested exclusively with the NLRB.

In all of the cases outlined above, unions were asserting preemption defenses in response to state court lawsuits which were identical to potential NLRA claims. Since the state courts had no jurisdiction to adjudicate these basic NLRA claims, the unions' assertions of the preemption defense were obviously challenges to the subject matter jurisdiction of the state courts. Like any other

subject matter jurisdictional challenges, those assertions of preemption which truly question the jurisdiction of the state courts may properly be considered non-waivable.

However, these "preemption as subject matter jurisdiction" cases should be contrasted with those cases in which Congress has refused to vest jurisdiction over the claim solely with the NLRB. For instance, this Court has recognized that where a case concerns unusually "deeply rooted" local interests, "appropriate consideration for the vitality of our federal system and for a rational allocation of functions belies any easy inference that Congress intended to deprive the States of their ability to retain jurisdiction over such matters." *Brown v. Hotel Employees*, ___ U.S. ___, 104 S. Ct. 3179, 3187 (1984). Thus, this Court has held that, where the claims presented to the state courts are not identical to those which could be presented to the NLRB, where the state claims are deeply rooted, and where there is no real risk of interference with the enforcement powers of the NLRB, the state courts may properly adjudicate the claims. *See, e.g., Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *Farmer v. United Brotherhood of Carpenters*, *supra*.

In the latter sort of case, typified by tort claims such as trespass, misrepresentation, libel and intentional infliction of emotional distress, preemption has been viewed as an affirmative defense, to be seasonably raised or waived. The reason for this view is that in a traditional state tort case clearly vested within the jurisdiction of a state court, an assertion of preemption does not challenge the state court's jurisdiction, but only the exercise of its legitimate power. Simply stated, where the preemp-

tion defense does not realistically challenge the court's subject matter jurisdiction, it can be nothing but an affirmative defense.

However, the ILA argues that this Court must hold that even where a state court has unquestioned jurisdiction over a traditional tort claim, a union may nonetheless assert preemption as a non-waivable subject matter jurisdictional defense at any time it chooses. This argument, if adopted, would radically alter the substantive and procedural laws of the several states. Furthermore, the ILA's position is not supported by this Court's prior decisions.

A prime example of the type of litigation which falls into the "preemption as affirmative defense" category is *Austin v. Old Dominion Branch No. 496, National Association of Letter Carriers*, 418 U.S. 264 (1974). There, a nonunion employee sued a union for libel, alleging that the union's use of the word "scab" against him was actionable. The state courts of Virginia upheld the claim and awarded damages to the employee. This Court reversed and held that preemption (and the First Amendment interests in free speech) prohibited the State of Virginia from sanctioning the use of the word "scab" in that way. However, this Court never held that the Virginia courts were without subject matter jurisdiction to bring the union into court in a libel action. Rather, this Court merely held that the Virginia courts' use of their legitimate power was subject to preemption because the effect of the state's exercise of power infringed too closely upon protected federal rights. Thus, by recognizing that the Virginia courts have jurisdiction to hear tort claims and that only the courts' ultimate exercise of their

traditional jurisdictional powers may be subject to federal preemption, this Court implicitly held that the union's assertion of preemption did not question the Virginia courts' subject matter jurisdiction, but only the nature and effect of their decisions. It is therefore illogical for the ILA to argue that this Court's decisions mandate that unions be allowed to assert preemption as a non-waivable subject matter jurisdictional defense at any time, even in cases where the state courts have unquestioned jurisdiction.

The case of *Farmer v. United Brotherhood of Carpenters, supra*, also supports the view that, in state court tort cases, a preemption defense concerns only the state court's exercise of its legitimate power and not its subject matter jurisdiction. In *Farmer*, this Court approved of state courts adjudicating intentional infliction of emotional distress claims against unions when the claims were not related to employment discrimination. However, this Court carefully cautioned state courts to control the *use* of their power, so that the effect of an intentional infliction of emotional distress judgment would not be excessive or infringe too closely upon some protected right. *Farmer*, 430 U.S. at 305-06. In giving that cautionary instruction, this Court undoubtedly understood that, where the state court has subject matter jurisdiction to hear the tort claim, an assertion of preemption will concern only the manner in which the state court has exercised its legitimate power and not the subject matter jurisdiction of the state court.

Thus, having failed to timely raise a preemption defense, which in this case could only have been a challenge to the state court's exercise of its power, the ILA must be held to have waived that defense.

II. REGARDLESS OF WHETHER OR NOT THE ILA PROPERLY RAISED ITS DEFENSES, APPELLEE DAVIS' MISREPRESENTATION LAWSUIT IS NOT SUBJECT TO FEDERAL LABOR LAW PREEMPTION.

Regardless of the definition this Court gives to the ILA's assertion of preemption, appellee Davis' claim for misrepresentation is not subject to federal labor preemption. The instant case is merely the flip-side of *Belknap, Inc. v. Hale, supra*. There, an employer hired "permanent" replacements for economic strikers who had been terminated. When the strike was settled, the employer began firing the "permanent" replacements and reinstating the strikers. The "permanent" replacements then sued the employer in Kentucky state court for misrepresentation and breach of employment contract. This Court held that Kentucky courts could enforce their misrepresentation laws against the employer.

In *Belknap, supra*, this Court once again utilized the *Sears, Roebuck & Co., supra*, formulation that the crucial issue is "whether the controversy presented to the state court is identical to that which could be presented to the Board." The Court then went on to uphold Kentucky's right to enforce its misrepresentation laws because 1) the Kentucky state claim for misrepresentation was not identical to the NLRB claims which could have been brought, such as whether the employer's strike tactics had converted the strike from an economic strike to an unfair labor practice strike; and 2) Kentucky had a substantial and deeply rooted interest in stopping misrepresentations toward innocent third parties. There is no

logical reason for this Court to apply Kentucky misrepresentation law to employers but then halt the application of Alabama's misrepresentation law to unions.

Mr. Davis is a supervisor, as clearly indicated by the Regional Director of the NLRB in a companion case brought by one of Davis' fellow ship superintendents. That decision by the Regional Director, who exercises the delegated power of the NLRB General Counsel, has both binding effect and precedential value. *See* 29 U.S.C. § 153(d). In *Hanna Mining Co. v. MEBA*, 382 U.S. 181 (1965), this Court held that state law could be applied against unions where the case involved supervisors and the supervisors' status was "settled with unclouded legal significance." In discussing what constitutes "unclouded legal significance," this Court stated that, "This language allows more than one interpretation, but we take it not to apply to those refusals of the General Counsel [to issue a complaint] which are illuminated by explanations that do squarely define the nature of the activity." *Id.* at 191-92. In exercising his delegated authority under § 3(d) of the NLRA, the Regional Director clearly found that an individual who performed duties identical to Mr. Davis was a supervisor. Given the uncontested facts of this case, the Regional Director's determination should be credited with "unclouded legal significance." Thus, there is no logical reason why the Alabama courts should be precluded from utilizing the Regional Director's legal and factual determination to sanction the ILA's knowing and intentional fraud. There is little, if any, risk of interference with the NLRA's adjudicatory scheme in this case. *See, e.g., Sears, Roebuck & Co., supra*, 436 U.S. at 188, n.13.

Of particular importance is the fact that under current NLRB case law, there is no possibility of a federal labor law remedy being granted to a supervisor in Mr. Davis' position, so there is again no risk of conflict with the NLRA. *See, e.g., Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982), *aff'd, Automobile Salesmen's Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983); *Wer-Coy Fabrication Co.*, 268 NLRB 907 (1984). Even the ILA admits that "a misrepresentation that the superintendents could not be discharged for union activities could never constitute an unfair labor practice" (Brief for Appellant, p. 15, n.18). Thus, since Davis is clearly a supervisor, even the ILA admits that his state tort lawsuit for misrepresentation poses no risk of conflict with the NLRB's procedures. Simply stated, Davis' lawsuit is not identical (or even similar) to any issues which could have been raised to the NLRB.

On the other hand, the ILA's position, if adopted by this Court, poses a great risk of undue interference with the substantive and procedural law of a sovereign state. Even where state courts clearly have jurisdiction to adjudicate an issue, unions will be free to abuse the preemption defense by waiting until the trial is over before they ever raise it. As the Alabama Supreme Court pointed out, this would give unions an unfair advantage over other litigants by mandating that they receive "two bites [or more] at the apple." Thus, application of the state's procedural rules will be hampered if litigants cannot rely upon the efficacy of their opponents' pleadings when those pleadings ignore the preemption defense.

With regard to state substantive law, a reversal of the Alabama Supreme Court would mean that states can

rarely apply their misrepresentation laws to unions, even when the unions admit that their fraudulent assertions can never be the basis of an NLRB charge. (See Brief For Appellant, p. 15, n.18). This would disastrously alter the delicate balance which this Court correctly struck in the recent decisions of *Belknap, supra*, and *Brown v. Hotel Employees, supra*, both of which were properly decided in favor of the state's ability to protect its citizens.

CONCLUSION

This Court has recognized broad exceptions to the doctrine of federal labor preemption in tort cases, over which the state courts have traditionally exercised jurisdiction. By agreeing to entrust the state courts with subject matter jurisdiction over these vital local issues, this Court has implicitly recognized that an assertion of preemption in defense of a state court tort lawsuit will constitute only a challenge to the state court's exercise of its legitimate power, and not its subject matter jurisdiction. Therefore, the decision of the Alabama Supreme Court, holding that preemption is an affirmative defense which the ILA failed to raise, should be affirmed.

By affirming the lower court's decision, this Court will assure that the courts of the several states do not suffer from undue federal interference in their local affairs. Moreover, the delicate balance which must be struck in federal labor preemption cases will be properly maintained if the Alabama Supreme Court is affirmed.

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QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court correctly understood appellant's preemption claim in holding that it fell within the scope of the Alabama procedural rule requiring certain defenses to be raised before trial, and not within the scope of the competing Alabama procedural rule that subject jurisdiction is not waivable?

2. Whether Congress, in enacting the federal labor laws, intended to allow litigants raising federal law defenses in the state courts to ignore the ordinary rules of procedure to which other litigants in the state courts must conform?

3. Whether, in a misrepresentation suit by a supervisor against a labor union, the union can avoid the jury verdict by claiming, after trial, that the supervisor was "arguably" not a supervisor, without proffering any evidence that he was not in fact a supervisor?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-217

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Appellant,

v.

LARRY DAVIS,
Appellee.

On Appeal from the Supreme Court of Alabama

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and their officials located throughout the United States. *Amici* and their members, therefore, have a vital interest in the legal issues that affect the powers and responsibilities of state and local government.

In holding that federal preemption under the *Garmon* doctrine[1] is an affirmative defense under Alabama law that must be timely raised in order to avoid waiver, the Alabama Supreme Court distinguished between federal law that by its terms displaces the subject matter jurisdiction of state courts over certain claims, and preemption that overrides state substantive law and power to act in a given field. This distinction "goes to the very nature and character of the power of the state courts to function within the constitutionally created system of federalism." J.A. 99a.[2]

The importance of this case to *amici* stems from its potential disruption of longstanding principles governing state-federal relations. Appellant apparently invokes the Supremacy Clause not only to displace the power of state courts to adjudicate disputes arising under a state statute imposing damages for misrepresentation, but also to supplant the normal procedural rules governing the orderly course of state judicial proceedings.

Appellant's argument would undermine the integrity of the adjudicatory process. The States have an interest in conserving their scarce judicial resources through *bona fide* procedural rules. Permitting a preemption defense to be raised for the first time after a jury has reached a verdict makes a mockery of the state court system. This case is also important to *amici* because appellant's preemption claim on the merits, if accepted by this Court, would erode the ability of the States to enforce ordinary rules of fair conduct among their citizens. Appellant urges an unwarranted expansion of federal authority to any case touching, however remotely, the area of labor relations.

Because a reversal of the decision below would have a direct and immediate adverse effect on matters of com-

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[1] *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

[2] References to "J.A." are to the Joint Appendix.

pelling importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[3]

STATEMENT OF THE CASE

This case arises from an attempt by the appellant International Longshoremen's Association (ILA) to organize ship superintendents at the Ryan-Walsh Stevedoring Co. facility in Mobile, Alabama. Ship superintendents employed by Ryan-Walsh oversee and direct the work of longshoremen, who are represented by the ILA. Each ship superintendent has the authority to hire, fire, suspend, discipline, transfer, assign, and reward such employees. (J.A. 57a.)

Organizing activity among the superintendents was begun by Ben Trione, a co-worker of appellee Davis. Trione contacted ILA representatives in Houston, who expressed initial doubts about their ability to organize the superintendents because of their supervisory duties. (Tr. 225.)[4] One of those representatives, Ben Holland, attended an organizational meeting in Daphne, Alabama, on April 12, 1981, a meeting also attended by Davis, Trione, and a number of other Ryan-Walsh ship superintendents.

The record contains conflicting testimony regarding certain aspects of this meeting. It is clear, however, that Holland assured those assembled that if they were fired for union activity, the ILA would stand behind them and obtain their reinstatement. (Tr. 36, 133, 229; see J.A.

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[3] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

[4] References to "Tr." are to the separately numbered pages of the transcript of proceedings before the trial court, which were a part of the record on appeal before the Alabama Supreme Court.

50a-51a.) The ship superintendents thereupon signed authorization cards.

The next day, Trione was fired for engaging in organizing activity. (Tr. 39.) He contacted Holland and, on Holland's advice, set up a picket line to protest his discharge. (Tr. 39, 234.) On April 21, 1981, Ryan-Walsh obtained a temporary restraining order from the Circuit Court of Mobile County, Alabama, to halt the picketing. (J.A. 53a-55a.) The ILA then hired an attorney to represent Trione. On April 24, 1981, that attorney filed an unfair labor practice charge on Trione's behalf with Region 15 of the National Labor Relations Board (NLRB). (J.A. 10a.) He also represented Trione at the preliminary injunction hearing in the Mobile County Circuit Court on April 28, 1981. The court, after hearing testimony, found that Trione was a supervisor and therefore not entitled to the protections of the National Labor Relations Act (NLRA), that Trione's picketing was not arguably protected by the NLRA, and that state law forbade such picketing. (J.A. 56a-61a.) No appeal was taken. On May 15, 1981, the Regional Director of the NLRB dismissed Trione's charge because he was a supervisor. (J.A. 62a-63a.) No appeal of the dismissal was filed.

Three days later, Davis, too, was fired for engaging in organizational activities. (Tr. 136.) At the time of Davis' discharge, his supervisor showed him the NLRB's letter of dismissal in the Trione case. (Tr. 135.) Davis therefore filed no charges against Ryan-Walsh. Instead, on October 5, 1981, he filed this lawsuit against the ILA, claiming damages for fraud and misrepresentation committed by Holland at the April 12, 1981, meeting. Davis alleged that he had undertaken the organizational activity in reliance upon Holland's statements that he could not be fired for union activities and that the ILA would get his job back for him if he were fired. (J.A. 11a-12a.)

The ILA answered, but failed to raise any claim that Davis' action was preempted. (J.A. 14a-17a.) Over the next two years, the parties engaged in extensive pre-trial discovery. (J.A. 2a-4a.) On November 14-15, 1983, the case was tried to a jury which returned a verdict in favor of Davis for $75,000. On December 13, 1983, nearly a month after the trial, and almost two years after its initial answer to the complaint, the ILA filed a motion for judgment *n.o.v.* containing sixteen grounds, the fifteenth of which raised for the first time the trial court's alleged lack of subject matter jurisdiction because of federal preemption. (J.A. 96a.)

The trial court denied the motion, and the ILA appealed. The Alabama Supreme Court held that the ILA had waived its preemption defense by not presenting it until after trial; the defense did not go to the trial court's subject matter jurisdiction and thus, under the Alabama Rules of Civil Procedure, had to be pleaded as an affirmative defense. The court recognized that some federal laws affect the jurisdiction of the state court, but held that the labor law preemption doctrine enunciated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), addressed the propriety of the State's exercise of its power, not the court's power to adjudicate *vel non*. Finally, the court noted that if it were to pass on the merits of the preemption defense, it would find that Davis' claim fell within the "peripheral concern" exception to federal preemption, citing *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966).

SUMMARY OF ARGUMENT

The Alabama Supreme Court's decision rests on an adequate and independent state ground, long recognized by this Court as precluding the exercise of its jurisdiction. This doctrine is essential to maintaining the historical independence of state judiciaries and ensuring that this Court's assumption of jurisdiction over a case is appro-

priate. In challenging the Alabama Supreme Court's holding that the preemption defense was waived, appellant has failed to distinguish between the state law elements of the Alabama Supreme Court's procedural ruling, which are not subject to review in this Court, and the very limited federal questions raised by that procedural ruling.

States control the procedure in their own courts. State rules establishing the manner in which claims and defenses must be asserted control federally derived claims and defenses, so long as the state rules do not deprive the party of a full and fair opportunity to raise the federal claim, nor discriminate against that claim. The Alabama rule requiring appellant to plead affirmatively its federal labor law preemption defense implements these principles, poses no conflict with federal law, and advances the sound public policy of the State.

To the extent that the Alabama Supreme Court was required to interpret federal law in order to apply its procedural rules, its interpretation of federal law was correct. To the extent that appellant intimates that Congress has overridden the state procedures that are otherwise applicable to its defense, appellant ignores fundamental principles governing the delicate balance of state-federal relations, reflected in the Constitution and long respected by this Court and by Congress.

On the merits, should this Court reach them, Davis' lawsuit was not preempted. There is no doubt that Davis was a supervisor. Supervisory organizing activity is neither arguably protected nor arguably prohibited by federal law. The claim involved here—that the Union promised something that it ultimately could not, or would not, give—is the type of claim that this Court has recognized as falling within the area of continued state authority.

ARGUMENT

I. THE DECISION OF THE ALABAMA SUPREME COURT RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Appellant raised its preemption defense for the first time after the jury had rendered an adverse verdict. Applying ordinary rules of Alabama procedure, the Alabama Supreme Court held that appellant's failure to raise the issue before trial as an affirmative defense precluded its assertion as a basis for nullifying the jury verdict. In so holding, the Alabama Supreme Court did not err, for it clearly understood the preemption claim appellant raised, and held that Alabama procedural rules precluded raising that claim after trial. The procedural basis relied upon by the court for rejecting appellant's substantive federal preemption claim precludes review of the merits of that claim by this Court.

In this Court, appellant argues that "since a claim of federal preemption is addressed to the subject matter jurisdiction of the state court, the defense is never waived and may be raised for the first time on appeal." Br. for Appellant 11. Appellant's phrasing of the issue, however, is wrong in two respects. First, it completely ignores the interpretation of state procedural law upon which the Alabama Supreme Court rested its decision. The procedural issue is whether the defense of preemption may be raised after trial. Second, it diverts attention from the only true federal question presented by the Alabama Supreme Court's procedural ruling, that is, whether Congress intended to supplant the state procedures themselves. Appellant attempts to raise the underlying federal substantive issue whether the misrepresentation claim was preempted. Appellant, however, cannot leap the procedural obstacles to its substantive claim merely by announcing that it goes to subject matter jurisdiction. The state court need not consider this issue if it is not raised in conformity with state procedural require-

ments, unless Congress *also* intended to supplant those procedural rules. In this Court, as in the Alabama Supreme Court, appellant does not squarely contend that Congress intended to preempt the state's procedural rules as well as its substantive law. Such a contention would be, in any event, at odds with the basic federal respect for state adjudication of federal rights that this Court has regularly demonstrated and that has historically guided Congress.

More than anything else, this case presents a question of the role of the state courts in the adjudication of federal rights.[5] In light of the historic understanding of that role, it would be one thing for appellant to assert merely that federal law supplants state law or even state "jurisdiction"; it is quite another for appellant to contend that Congress has supplanted the procedures by which litigants can raise federal defenses in the state courts. Given that distinction, the Alabama Supreme Court's procedural ruling precludes review in this Court.

A. The Adequate and Independent State Ground Doctrine Reflects a Fundamental Federal Respect for State Rules of Procedure.

This Court has consistently refused to review judgments of state courts that rest on adequate and independent state grounds.[6] This refusal rests, in substantial

[5] As Justice Frankfurter noted in a similar context:

> This is one of those small cases that carry large issues, for it concerns the essence of our federalism—due regard for the constitutional distribution of power as between the Nation and the States, and more particularly the distribution of judicial power as between this Court and the judiciaries of the States.

Staub v. City of Baxley, 355 U.S. 313, 325-26 (1958) (dissenting opinion).

[6] *See Herb v. Pitcairn*, 324 U.S. 117, 124 (1945), *citing Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)); *Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.*, 243 U.S. 157, 164 (1917); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908); *Murdock v. Memphis*, 20 Wall. 590, 636 (1874).

measure, on notions about the proper allocation of power between the state and federal judicial systems, and upon a fundamental concern for the continued independence of the state judiciaries.[7] The rule that federal law "takes the state courts as it finds them" rests on "a belief in the importance of state control of state judicial procedure." Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954). The States control the procedure in their courts, and "state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." *John v. Paullin*, 231 U.S. 583, 585 (1913).[8]

The rule applied by this Court is that the States may enforce even a highly technical procedural rule to the detriment of a federal claimant, so long as the rule preserves a full and fair opportunity for assertion of the federal claim and is fairly applied.[9] Appellant does not

[7] The refusal also reflects important jurisdictional considerations. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as the avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground").

[8] This established policy of deference to local procedure is reflected in the many decisions of this Court holding that a failure to raise a federal question at the time required by state law will preclude review. *See Atlantic Coast Line R.R. Co. v. Mims*, 242 U.S. 532, 535-37 (1917); *Parker v. North Carolina*, 397 U.S. 790, 798-99 (1970); *Herndon v. Georgia*, 295 U.S. 441 (1935); *Nevada-Cal.-Or. Ry. v. Burrus*, 244 U.S. 103, 105 (1917). *See also Orr v. Orr*, 440 U.S. 268, 274, 275 & n.4 (1979).

[9] The procedural rule must not be used pretextually to thwart the claim, must not foreclose a full and fair opportunity to raise the claim, and must not discriminate against the federal claim. *See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945); *Nevada-Cal.-Or. Ry. v. Burrus*, 244 U.S. 103, 105 (1917); *see also Staub v. City of Baxley*, 355 U.S. 313, 328-29 (1958) (dissenting

contend that it was precluded from raising its preemption claim or that the Alabama procedural rule discriminates against federal claims. *See* Parts I.B. and C., *infra.*

This basic respect for the independence of the state courts, deeply embedded in this Court's adequate state ground jurisprudence, reflects not only sound judicial policy but fundamental constitutional policy as well. Just as the Court has demonstrated its reluctance to supplant the normal course of adjudication in the state courts, so can we presume that Congress is also loath to displace the ordinary procedural rules applied in the state courts, even for the adjudication of federal claims. Thus, the Court should be disinclined—beyond even this Court's usual reticence to find state *substantive* law impliedly preempted by congressional enactment—to read into Congress' substantive enactments an intention to upset the normal course of procedure that the States have established to govern their judicial systems.

Appellant has cited no evidence of a congressional intent in the federal labor laws to nullify state court procedural rules. Absent the clearest expression to the contrary, it should be presumed that Congress was content with the basic assumption, safeguarded by this Court, that the state courts would give litigants asserting federal claims a full and fair opportunity to be heard, and would not discriminate against such claims.

B. The State Procedural Rule Allowed Adequate Opportunity to Raise the Federal Defense.

The Alabama Rule of Civil Procedure requiring the preemption defense to be raised affirmatively allowed ample opportunity for a full and fair hearing on ap-

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opinion). *See generally* R. Stern & E. Gressman, *Supreme Court Practice* 239-45 (5th ed. 1978); C. Wright, *Federal Courts* § 107, at 744-45, 748-49 (4th ed. 1983); R. Robertson & F. Kirkham, *Jurisdiction of the Supreme Court of the United States* § 103, at 189-90 (2d ed. R. Wolfson & P. Kurland 1951).

pellant's federal defense. Appellant simply failed to take advantage of that opportunity.

There is nothing novel about the notion that an affirmative defense must be timely raised. Litigators are fully aware that they must, at the outset of a case, give careful attention to the legal issues raised by the complaint and any unusual defenses that they might raise. Certain defenses must be raised early so that the issue can be decided without waste of judicial resources and so that the plaintiff and the court are put on notice of a potentially dispositive legal claim.[10] The Alabama Supreme Court recognized these very policy considerations (J.A. 100a-101a), and also recognized the unfairness of allowing a defendant to take "two bites at the same apple" by reserving such a defense until after the jury has reached its verdict. (J.A. 101a.) Appellant does not and could not seriously contend that its preemption defense (such as it is) was not fully apparent before trial or that Alabama law provided no fair opportunity to raise it.[11]

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[10] *Cf. Henry v. Mississippi*, 379 U.S. 443, 447 (1965) (state procedural rules that lack legitimate purpose are no bar to this Court's review). Appellant makes no claim that the Alabama rule at issue fails to serve a legitimate interest.

[11] In this Court, appellant makes one claim that arguably could not have been raised by affirmative defense before trial: the claim that the jury's verdict was so excessive that it interfered with the federal labor law scheme. Such a claim is generally appropriate in a motion j.n.o.v. Appellant, however, did not raise this federal issue in the trial court at all, either in the motion or otherwise. Although appellant claimed generally that the verdict was excessive, it relied on no federal ground. *See* J.A. 95a. Even in the Alabama Supreme Court, appellant argued only that *punitive* damages were *per se* barred by federal law, clearly an argument that should have been raised before the jury was instructed on punitive damages.

Moreover, the cases upon which appellant now relies, *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), and *Farmer v.*

C. The Alabama Supreme Court Understood the Federal Defense and Fairly Applied Alabama Procedure to It.

The state courts must "fairly" apply their procedural rules to federal claims and may do so no more restrictively than they would apply them to comparable state law claims. This requirement has two legal components. First, it involves delineation of the state procedural rule itself, the construction of which is a question purely of state law. That issue requires no extended discussion here. Second, it may require—as it does in this case—an understanding of the federal issue being raised, so that the federal claim can properly be fit within the pre-existing procedural rules. The correctness of the state court's understanding of the federal issue is a federal question.

1. *The Alabama Supreme Court properly applied its "affirmative defense" rule to appellant's claim of potential conflict between the state law of misrepresentation and federal labor law.*

Appellant's *Garmon* preemption claim is based on the assertion of conflict, or potential conflict, between state misrepresentation law and federal labor law. The Ala-

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United Bhd. of Carpenters, 430 U.S. 290 (1977), make clear that the state courts are not charged with a roving commission over "excessive" jury awards. The sole function of the state court in reviewing a damages verdict in a case involving both federally protected and unprotected conduct is to ensure that the jury did not award damages on the basis of the *protected* conduct. This is ensured *first* by instructing the jury not to do so. *See Farmer*, 430 U.S. at 305-06; *Linn*, 383 U.S. at 65-66. Thus, the claim of preemption based on an excessive award was also waived.

[12] The Jurisdictional Statement ("J.S.") summarized the issues appellant raised below as part of a three-pronged attack. Only the first, that Alabama was "totally preempted from applying its law of misrepresentation to the ILA's organizational activities" (J.S. 7), had a quasi-jurisdictional ring to it. The second and third prongs of appellant's argument below were squarely based upon the contention that state law is preempted to the extent that it actually conflicts with federal law.

bama courts had no difficulty in understanding that claim or in fairly applying their procedural rules to it.

In Alabama, matters constituting an avoidance of a plaintiff's cause of action are routinely treated as affirmative defenses, regardless of whether they are specifically identified in Ala. R. Civ. P. 8(c).[13] *See* Committee Comments to Ala. R. Civ. P. 8(c). The Alabama Supreme Court has defined "an affirmative defense" as any "new matter which, assuming the complaint to be true, constitutes a defense to it." *Bechtel v. Crown Central Petroleum Corp.*, 451 So.2d 793, 795 (Ala. 1984) (quoting Black's Law Dictionary).[14]

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[13] Rule 8(c) of the Alabama Rules of Civil Procedure provides in part:

> (c) *Affirmative Defenses*—In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license payment, release, res judicata, statute of frauds, statute of limitations, waiver, and *other matter constituting an avoidance or affirmative defense.* [Emphasis added.]

[14] *Bechtel v. Crown Central Petroleum Corp.*, 451 So.2d 793 (Ala. 1984), involved the defense of employer immunity because of the worker's compensation scheme. *See also Metropolitan Life Ins. Co. v. Sullen*, 413 So.2d 1106, 1108 (Ala. 1982) (insurer's defense that beneficiaries were barred from recovery by a mental infirmity exclusion contained in life insurance policy); *Lacey v. Davis*, 361 So.2d 543, 546 (Ala. 1978) (defense based on trust arising from widow's oral agreement to hold land during her lifetime and transfer it at her death); *Williams v. Nash*, 428 So.2d 96, 100 (Ala. Civ. App. 1983) (defense to enforcement of judgment based on lack of personal jurisdiction of rendering court held to be an affirmative defense, rather than a contention "that the Alabama court lacked jurisdiction over any aspect of the case," because the challenge "goes to the merits" of the action to enforce the judgment).

A defense of preemption is plainly in the nature of avoidance of the underlying cause of action and thus within the scope of the Alabama rule. Precisely as with the defense of illegality, for example, a defense of preemption concedes *arguendo* that the complaint states a valid claim under general principles of law, but seeks to avoid responsibility by resort to principles transcending that law. With respect to "illegality," the overriding principle is found in competing state law or public policy. In the case of preemption, the overriding principle is found in federal law and the Supremacy Clause of the United States Constitution.[15]

There is no claim, nor any basis for a claim, that the Alabama court somehow discriminated against, attempted to evade, or improperly characterized the preemption defense, by deeming it a waivable affirmative defense for purposes of state procedural law.[16] Thus, to the extent

[15] Appellant asserts in its Jurisdictional Statement:

> Where state law is in conflict with an act of Congress, it is unconstitutional under the Supremacy Clause . . . . The effect of this repugnance is to render the offending law null and void . . . . Since the state law pursuant to which the action is brought is void, there is no subject matter to which a court's jurisdiction can attach, and this lack of subject matter jurisdiction can be raised at any time.

J.S. 10. That argument is obviously circular and also grossly overbroad. It would appear to apply not only to every preemption claim, but also to any other lurking defense that rendered state law ineffective. It would certainly apply to any claim of unconstitutionality under state or federal law. But the Court has frequently held that claims of unconstitutionality are waivable. *See, e.g., Herndon v. Georgia*, 295 U.S. 441 (1935). Appellant's argument, in any event, does not describe this case. Alabama's misrepresentation statute is not null and void. The statute is valid on its face. Even if the preemption claim had merit, only Davis' claim under the statute, not the statute itself, would be preempted.

[16] An earlier decision of the Alabama Supreme Court, *Powell v. Phenix Federal Savings & Loan Ass'n*, 434 So.2d 247, 251 (Ala. 1983), similarly held that a preemption claim based upon conflict with federal banking regulations must be raised as an affirmative defense.

A claim of discrimination might be made if the state courts readily granted relief from strict application of the waiver rule in some instances but denied it for preemption claims. *See Staub v. City of Baxley*, 355 U.S. at 320. Appellant has not made, and could not make, such a claim. The Alabama courts routinely apply the waiver rule to affirmative defenses based on state law. *See, e.g., Hughes v. Wallace*, 429 So.2d 981, 983 (Ala. 1983) (statute of frauds); *Jackson v. Waller*, 410 So.2d 98 (Ala. Civ. App. 1982) (contributory negligence); *Carter v. Smith*, 402 So.2d 1017 (Ala. Civ. App. 1981) (estoppel). Moreover, under the circumstances of this case, where appellant put the plaintiff, the court, and the jury to the expense and trouble of a trial, and waited until after an adverse verdict to raise the preemption defense, it seems likely that few courts would be inclined to waive such a procedural default.

appellant's preemption defense rests on a theory of real or potential conflict between federal law and state law, the claim is plainly immune from review because the state procedural ruling constitutes an adequate and independent state ground of decision.

2. *Appellant's* Garmon *claim did not fall within the scope of the Alabama rule that challenges to subject matter jurisdiction are not waivable.*

Along with the rule that certain matters must be raised by way of affirmative defense, Alabama courts recognize the competing precept that subject matter jurisdiction is not waivable and may be raised at any time. Appellant has tried to bring its preemption defense within the scope of that competing principle.

Alabama's rule allowing the defense of lack of subject matter jurisdiction to be raised at any time is a matter of state law. Ala. R. Civ. P. 12(h)(3). Alabama's interpretation of that rule is also a question of state law. Despite creditable lineage, the rule neither rests on immutable jurisprudential foundations, nor enjoys any constitutional dimension. See Restatement (Second) of Judgments § 11, at 111 (1982). The manner in

which the states apportion subject matter jurisdiction among their courts, and the rigidity with which they adhere to that apportionment once made, is strictly a matter of state concern. Given the variety of state judicial systems, one would not expect them all to apply the rule in precisely the same manner or with the same rigidity, nor expect the state courts to apply it as rigidly as the federal courts.[17] No federal constitutional issue is

[17] Because expansion of federal court jurisdiction could encroach on state sovereignty, it is not surprising that the rule that subject matter jurisdiction cannot be waived has achieved its most extreme expression in the federal courts.

As the Restatement notes:

> In these contexts, the interest of securing rigorous adherence to jurisdictional limitations was a strong and predominant policy consideration. It was one that therefore could appropriately be given precedence over the interest of fairness that would otherwise dictate that a challenge to subject matter jurisdiction ought to be unavailable unless raised before trial on the merits.

But the Restatement continues:

> In modern context, the relative weight of these interests has shifted . . . . It may well be that procedural rules of the future will be reformulated to require that objections to subject matter jurisdiction be raised before trial on the merits . . . .

Restatement (Second) of Judgments, § 11, at 111. To the extent that this increased concern about basic fairness is reflected in the Alabama rule, this Court should not halt the evolution.

In any event, the rule as applied in the federal courts has been soundly criticized. Professor Moore calls it the "fetish of federal jurisdiction" and has urged its ouster. 1 J. Moore, *Federal Practice* § 0.60[4] at 624. The federal courts now recognize that a judgment may not be collaterally attacked on the basis of the contention that it was rendered by a court without subject matter jurisdiction. *See Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *but cf. Kalb v. Feuerstein*, 308 U.S. 433, 440 (1940) (allowing collateral attack on the basis of a federal statute that expressly divested state courts of continuing jurisdiction).

If the federal courts can adopt a rule that bars *collateral* attack on a judgment for lack of subject matter jurnsdiction, there is no

raised by the rule itself or by differences in the application of the rule.

In fact, the Alabama courts do not give a particularly novel cast to the nonwaivability rule. They construe it literally, treating as nonwaivable only the narrow class of true jurisdictional objections, limitations on the power allotted *to the courts* to entertain particular claims. Statutes setting a jurisdictional amount,[18] certain rules prescribing filing or other deadlines,[19] and statutes designating particular courts or forums for particular types of disputes,[20] are treated as jurisdictional. Thus, in Alabama, the rule that "subject matter jurisdiction" cannot be waived is applied only to the specific authority of the courts *vel non* to entertain the claim at issue.

The Alabama Supreme Court held that the rule that "subject matter jurisdiction cannot be waived" was not applicable to appellant's preemption defense. Appellant alleges, however, that Alabama lacked power to apply its law, and cites *Garmon* and a line of cases in which this Court has casually used the term "jurisdiction" to describe the displaced power of the States to act. Br. for Appellant 10-11.

Garmon preemption, however, does not directly address the jurisdiction of the courts. *Garmon* preemption reflects broader, substantive concerns. If the statutory tort claim for damages resulting from appellant's misrepresentations were preempted by federal law, it would not be because the claim was brought in a state

reason that a state court cannot require such a defense to be *timely* raised within the proceeding itself.

[18] *Ex parte Smith*, 438 So.2d 766 (Ala. 1983).

[19] *Payne v. Dep't of Indust. Rel.*, 423 So.2d 231 (Ala. Civ. App. 1982); *Bibb v. Boyd*, 417 So.2d 206 (Ala. Civ. App. 1982).

[20] *Kelley v. English*, 439 So.2d 26 (Ala. 1983); *Alabama State Bar v. Watson*, 272 So.2d 240 (Ala. 1972).

court, but because the claim itself was invalid under federal law. In short, *Garmon* is not a limitation on the jurisdiction of state courts, but rather a limitation on the creation or recognition of rights under state law, which only incidentally affects the courts by depriving them of viable claims to adjudicate.[21]

The Alabama Supreme Court thus understood appellant's preemption claim and knew that it was not what it considered "subject matter jurisdiction." Despite its jurisdictional gloss, *Garmon* focuses on the power of the states to *apply* state law in certain areas because of a conflict, or potential conflict, between state law and federal rights. It involves the State's legislative, not judicial, competence. The Alabama Supreme Court, therefore, did not err in declining to shoehorn appellant's preemption claim into a procedural rule reserved for claims directly challenging the existence of judicial power.

In holding that appellant had failed properly to raise the preemption defense, the Alabama Supreme Court did not demean either the *Garmon* line of cases or federal supremacy. As the Alabama court stressed, its decision was procedural. However fundamental the general supremacy of federal substantive law, or the particular fed-

[21] A *Garmon* preemption claim is unlike a challenge to subject matter jurisdiction in other respects as well. Rules of subject matter jurisdiction should be discrete, concrete, and readily determinable, and thus capable of resolution at the outset of the proceeding; they should be capable of being easily identified so that the court itself may "notice on its own motion a failure as to subject matter jurisdiction." Br. for Appellant 12. It simply blinks the complexity and quantity of federal law, and of federal preemption jurisprudence, to impose on a state court "a duty to recognize on its own initiative the issue of federal preemption, if that defense is properly presented by the facts of the case." *Id.* There is simply too much and too varied federal law to expect the state courts to be cognizant of the penumbral preemptive effects of all that law on the enforcement of seemingly routine state claims.

eral control of labor relations, the state court did not undermine those doctrines when it insisted that they be presented in conformity with state procedures.[22]

D. In Enacting the Federal Labor Laws, Congress Did Not Preempt the Ordinary Rules of Procedure Applied in the State Courts.

There is yet a third question presented by this case: whether, in enacting the federal labor laws, Congress intended to displace the rules of procedure that ordinarily govern adjudication in the state courts. This question is arguably raised in this Court by appellant's claim that federal preemption generally, or labor law preemption in particular, can never be waived.[23] The question is of utmost importance; fortunately, it is not difficult to answer.

Whether Congress intended federal labor law preemption claims to supplant the usual procedural rules applicable to the conduct of cases in the state courts is, of course, a federal question. *See Kalb v. Feuerstein*, 308

[22] Because it is merely the scope of a state procedural rule that is at issue, other state courts, and the federal courts, may define their "subject matter jurisdiction rule" differently.

[23] Despite the trial court's holding that appellant had waived its preemption defense, appellant made no claim on appeal that this conclusion itself violated federal law. *See Herndon v. Georgia*, 295 U.S. 441 (1935). To the extent that appellant raised the procedural issue at all, it contented itself with the argument that preemption destroyed subject matter jurisdiction and, therefore, under general jurisprudential principles, the defense could not be waived. And nowhere in the questions presented or appellant's brief does appellant directly suggest that federal law overrides otherwise applicable state procedures. Nevertheless, because the question is arguably encompassed within the general claims raised both in the Alabama courts and this Court, and is essential to a proper understanding and disposition of the case, the Court could properly reach it.

U.S. 433, 438 (1940); *see also* Hill, *The Inadequate State Ground*, 65 Colum. L. Rev. 943, 944-46 (1965).

Whether Congress could prescribe procedural rules to govern federal preemption defenses in state courts is a question that the Court need not decide. It suffices that Congress has not done so in this case; to presume such an intention on the part of Congress would run "counter to the whole course of federal judiciary legislation and federal adjudication." *Brown v. Gerdes*, 321 U.S. 178, 193 (1944) (concurring opinion). Absent the clearest indication from Congress that it intends a contrary result, this Court must assume that when Congress enacts substantive law, it leaves the state judicial systems as it finds them, free to apply their general rules of procedure to all claims, state or federal, that come before them.[24] So long as state procedures do not deny litigants seeking to raise federal claims a fair opportunity to do so, and do not discriminate against federal claims and defenses, Congress' objective in enacting a particular substantive statute should be deemed satisfied.

The reasons for this assumption are rooted in the federal system, the need for orderly procedure, and practical concerns about the administration of any different rule. The ability of a State to establish procedures to govern the conduct of litigation in its own courts lies close to the core of state sovereignty (*see FERC v. Mississippi*, 456 U.S. 742, 774-75 (1982) (Powell, J., concurring and dissenting)), and is ordinarily well beyond the area of federal concern. From the time of the first Judiciary Act, the state courts were expected to adjudicate federal as well as state rights (*see Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 221 (1916)), without the imposition of a federal code of procedure.[25] Differences in state procedural law have been with us from the inception of the Union, and neither Congress nor this Court has ever questioned such differences.[26]

[24] As noted above, "[t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954).

Moreover, the virtue of modern procedural reform has been the establishment of general procedural rules to govern the conduct of "*all* suits of a civil nature." *See* Fed. R. Civ. P. 1. For the federal courts, Congress generally has not created different sets of rules for different categories of cases. By and large, Congress has left to the courts themselves the responsibility of applying this single set of procedural rules to the many and varied cases that may arise. Indeed, the primary advantage of general rules of procedure is that they can be applied by the courts to all types of cases; and they can be understood by attorneys who practice in those courts, even

[25] *See generally Brown v. Gerdes*, 321 U.S. 178, 188-193 (1944) (concurring opinion). Any other approach tends to deprive the state courts of their "independent existence":

> That is to say, whether they should be considered as state or Federal courts would from day to day depend not upon the character and source of authority with which they are endowed by the government creating them, but upon the mere subject matter of the controversy which they were considering.

Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211, 221 (1916) (rejecting the notion that the Seventh Amendment jury trial requirement applies to the states when federal statutory claims are heard in the state courts.)

[26] Even with respect to the writ of *habeas corpus*, which finds its origins in the Constitution itself and which by its nature involves the most fundamental of constitutional rights, this Court has held that defendants must comply with state procedures in order to preserve their federal claims. In interpreting the federal statutes that govern the exercise of the writ, the Court has declined to find in them a congressional authorization to upset the procedural rules that ordinarily govern the conduct of cases in state criminal trials. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 81-91 (1977); *Stone v. Powell*, 428 U.S. 465, 494-95 & n.37 (1976).

those who are not expert in a particular field of substantive law. Given this basic purpose of procedural rules, it is impossible to attribute to Congress the intent to deny to the States and state judicial systems the integrity of their adjudicatory structure by impliedly mandating special rules for the adjudication of federal claims.[27]

Finally, any other rule would lack a limiting principle. Each time that a federal claim is raised in a state court, a litigant would be free to argue that, in order properly to effectuate Congress' intent, state procedures, including rules of pleading, timing, and joinder, must give way to the federal interest in allowing federal claims and defenses to prevail. And, if the federal claim has apparent merit, a state procedural rule will always appear "arbitrary" simply because it thwarts that claim. In a sense, all procedural rules are arbitrary. The appearance of arbitrariness only illustrates why state procedure needs to be respected. The Court should insist, therefore, upon a clear indication of congressional intent to preempt local procedure and the extent of the preemption, before concluding that it has been supplanted by federal law. In the absence of such a clear indication, there are no manageable standards by which this Court could provide relief from a state procedural rule that had the effect of precluding consideration of a federal claim.[28]

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[27] The Alabama Supreme Court noted in this case the kind of havoc that would be wrought on the integrity of the state trial system if litigants were free to wait until after a verdict is rendered before deciding to present a potentially dispositive argument. J.A. 101a.

[28] For example, in this case appellant argues that it was not required to raise its preemption defense before trial but could instead raise it by a motion j.n.o.v. to avoid the effect of a jury verdict. It is not clear whether the rule that appellant seeks would allow a preemption defense to be raised for the first time on appeal, or for the first time at oral argument on appeal. If the defense could be raised for the first time on appeal, it is unclear whether the normal rules of timeliness for taking an appeal would apply if they prevented appellant from making the belated claim.

Appellant has not attempted to show that Congress specifically intended to preempt the procedural rules relied upon by the Alabama courts. As discussed above, appellant has also failed to show that the Alabama Supreme Court applied its rules in a way that deprived appellant of an adequate opportunity to raise its federal defense or discriminated against that defense. Therefore, although the question whether federal law has displaced state procedural rules is a federal question, it is not, as presented here, a substantial question.

Thus, the principal claims pressed on this appeal cannot be reviewed because the judgment rests on an independent and adequate state ground. The genuine federal claims that might properly be considered by the Court are, on this record, insubstantial. Therefore, the appeal must be dismissed. If the Court deems the question whether Congress sought to override state procedures to be propery raised here, and to be jurisdictionally substantial, the Alabama Supreme Court's judgment should be affirmed.

II. DAVIS' CAUSE OF ACTION WAS NOT PREEMPTED BY FEDERAL LABOR LAW.

If the Court reaches the merits of appellant's preemption claim, appellant must still lose because Davis' state law tort claim is not preempted under the *Garmon* doctrine. *Garmon* preemption applies only when the conduct in question is arguably protected by Section 7, or arguably prohibited by Section 8, of the NLRA. The crux of appellant's argument on the merits is that "[a]bsent a clear determination by the NLRB that ship superintendents are supervisors rather than employees, superintendents are arguably employees [who are arguably protected by § 7 of the NLRA] and the state is preempted from applying its law" to appellee's tort claim. Br. for Appellant 13; *see also id.* at 14.

Appellant concedes that union organizing activity directed at supervisory personnel is neither protected nor prohibited by federal law. *Id.* at 20. And appellant makes no attempt to offer any facts or arguments to suggest that Davis was *not* in fact a supervisor. There is simply no support for appellant's claim that preemption is nonetheless appropriate because Davis was only "arguably" a supervisor, and therefore "arguably" protected under Section 7 as an employee.

Before 1947, the Board had ruled that supervisors were employees under the law and that their right to organize was protected.[29] Congress concluded, however, that organizing supervisors would "threaten realization of the basic ends of federal labor legislation," (*Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 660 (1974)), and in 1947 amended the law to deny supervisors the protections of the NLRA. Supervisors are not employees under the NLRA; management has a right not to hire union members as supervisors, and to fire supervisors for union membership or organizing activity. *See Florida Power & Light Co. v. Electrical Workers*, 417 U.S. 790, 808 (1974). "[A]ctivity designed to secure organization or recognition of supervisors cannot be protected by § 7 of the [NLRA], arguably or otherwise." *Hanna Mining Co. v. Marine Engineers*, 382 U.S. 181, 188 (1965). By the same token, organizing of supervisors is not prohibited by federal law.[30] Organizing efforts involving supervisory

[29] *See generally NLRB v. Bell Aerospace*, 416 U.S. 267, 277-78 (1974).

[30] The Labor Management Relations Act of 1947 (29 U.S.C. 164) struck a compromise, allowing supervisors to join unions and permitting employers to recognize and bargain with supervisors' unions on a voluntary basis. *See, e.g., Florida Power & Light Co. v. Electrical Workers*, 417 U.S. 790 (1974); *see also* S. Rep. No. 105, 80th Cong., 1st Sess. 5 (1947); H.R. Rep. No. 245, 80th Cong., 1st Sess. 17 (1947).

personnel thus fall beyond the scope of federal law and may be regulated by state law.[31]

Allowing the state damage remedy for misrepresentation on the facts of this case poses no "realistic threat of interference with the federal regulatory scheme," (*Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 301, n.10 (1977)), and follows directly from this Court's decision in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983).[32] In *Belknap*, the Court held that an employer was not immune to state law misrepresentation and breach of contract suits brought by discharged strike replacements who had wrongly been assured that they

[31] This conclusion is not inconsistent with this Court's decisions in *Iron Workers v. Perko*, 373 U.S. 701 (1963), and *Local 926, Operating Engineers v. Jones*, 460 U.S. 669 (1983). In *Perko* and *Jones*, the Court concluded that where a union demands and obtains the discharge of a supervisor, its conduct may have a sufficient impact upon the protected rights of both bargaining unit employees and the employer to warrant exclusive NLRB jurisdiction. The Court reasoned in both cases that a union-procured discharge might coerce bargaining unit employees into believing that they, too, would be fired for disagreeing with the union, thus inhibiting their exercise of Section 7 rights to refrain from concerted activities. Union demands that an employer discharge a supervisor might also coerce an employer in the choice of his bargaining representative under Section 8(b)(1)(B). *Perko* and *Jones* thus do not establish that all state lawsuits filed by a supervisor are preempted, but only that where the discharge of a supervisor has a coercive impact upon the protected rights of employees or employers, it may be preempted. *See also Parker-Robb Chevrolet*, 268 N.L.R.B. No. 58 (1982), *enforced sub nom. Automobile Salesmen's Union v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

[32] Davis' claim falls entirely outside the scope of *Garmon* because appellant's conduct was neither arguably protected nor prohibited by federal law. There is thus no need to reach the Alabama Supreme Court's ruling that the conduct is merely a "peripheral concern" of federal labor law. It is plain, however, that the States have a strong interest in protecting their citizens against fraud (*see Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966)), and that the tangential federal interest in attempts to organize supervisors is far too weak to override that strong state interest.

would not be terminated to make room for returning strikers. The Court found the state free to enforce "solemn promises of permanent employment, made to innocent replacements, that the employer was free to make and keep under federal law." 463 U.S. at 506.[33] Like the employer in *Belknap*, the ILA in this case had made a "solemn promise" to Larry Davis, who relied upon that promise to his detriment. In such circumstances, the promisor remains accountable for the consequences of his promise under generally applicable principles of state law. There is no federal interest in thwarting the remedies of persons injured by such conduct.

Appellant's belated attempt to cast doubt on Davis' supervisory status is, on this record, disingenuous. This suggestion comes after pleadings, discovery, and a trial conducted on the assumption that Davis was a supervisor. The ILA sought at trial to establish that Davis, as a supervisor, nevertheless had the right to join a union. Indeed, the ILA introduced into evidence the conclusion of the NLRB Regional Director in Trione's case that ship superintendents were supervisors, as well as the findings of the Alabama Circuit Court, in granting Ryan-Walsh a preliminary injunction, confirming that the ship superintendents were supervisors.[34]

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[33] *See also W.R. Grace & Co. v. Local 759, Rubber Workers*, —— U.S. ——, 103 S.Ct. 2177 (1983) (employer must keep voluntary promises made to innocent bargaining unit employees).

[34] The test for supervisory status under federal law is clear. Section 2(11) of the NLRA provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to *hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if* in connection with the foregoing *the exercise of such authority* is not of a merely routine or clerical nature, but *requires the use of independent judgment.*

(Emphasis added.) The Alabama Circuit Court found, in the Trione injunction proceeding, that ship superintendents had the following responsibilities:

Thus, rather than argue that Davis was *not* a supervisor, appellant argues instead that only the NLRB could finally determine whether he was a supervisor, implying the need for Davis to exhaust administrative remedies to avoid any possible conflict between federal and state interests. Br. for Appellant 15-17. But the Court has never held that an administrative explanation is a necessity, particularly where the facts are essentially undisputed and the legal definitions are not in doubt.[35] In short, nothing in this Court's jurisprudence imposes an exhaustion requirement in a case such as this (*compare Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965)). Indeed, it is difficult to see how Davis, who must have believed that he was a supervisor, could have invoked the jurisdiction of the NLRB in the first place.

The Alabama Supreme Court wisely decided that a motion j.n.o.v. was too late to challenge the jury's verdict

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> 5. Ryan-Walsh also employs a number of persons, known as "ship superintendents" whose responsibility it is to oversee and direct the work of its employees at various work sites in the Port of Mobile. Each of these ship superintendents has authority, in the interest of Ryan-Walsh, to *hire, transfer, suspend, discharge, assign, reward and discipline other employees, or has responsibility to direct them and to adjust their grievances, or to effectively recommend such action, all based on their independent judgment.* Prior to the termination of his employment, defendant [Trione] was employed as a ship superintendent by Ryan-Walsh and was possessed with the aforesaid authority.

(J.A. 57a; emphasis added.)

[35] In *Operating Engineers v. Jones*, Jones' unfair labor practice charge was not dismissed on the grounds that he was a supervisor (*see* 460 U.S. at 672-73 n.4; *id.* at 680), nor did Jones appeal the dismissal of this charge to the NLRB's General Counsel. Nevertheless, this Court had no difficulty in concluding that Jones was at all times employed as a statutory supervisor. 460 U.S. at 678. And in *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), the NLRB had never ruled on Linn's supervisory status, yet it was clear from the record that Linn was at all times a statutory supervisor whose libel claim was not preempted.

when the defense could have altered substantially the nature of the evidence and argument presented at trial. *Cf. Nevada-California-Oregon Ry. v. Burrus*, 244 U.S. 103 (1917). Not even in the context of a "subject matter jurisdiction" claim, may the party who sponsored the evidence, and thus the factual findings that form the basis of jurisdiction, challenge that jurisdiction. *See Verzosa v. Merrill Lynch, Pierce, Fenner & Smith*, 589 F.2d 974 (9th Cir. 1978); *Di Frischia v. New York Central R.R.*, 279 F.2d 141 (3d Cir. 1960).

CONCLUSION

For the foregoing reasons, this appeal should be dismissed. In the alternative, the judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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